85 - 2039

No.

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF HORTON JOHNSON, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars an action under the Federal Tort Claims Act brought on behalf of a serviceman killed during a military mission where the complaint alleges the negligence of civilian employees of the federal government who participated in the military mission.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-10a) is reported at 779 F.2d 1492. The opinion of the court of appeals (App., *infra,* 11a-34a) is reported at 749 F.2d 1530. The district court's order (App., *infra,* 35a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 33a) was entered on January 13, 1986. On April 3, 1986, Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671 *et seq.*], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. Lieutenant Commander Horton Johnson was a helicopter pilot in the United States Coast Guard. The Coast Guard is "a military service and a branch of the armed forces of the United States" (14 U.S.C. 1) and is responsible for operating "rescue facilities for the promotion of safety on, under, and over the high seas * * * of the United States" (14 U.S.C. 2). In the early morning hours of January 7, 1982, Lieutenant Commander Johnson's Coast Guard station in Hawaii received a distress call from a boat lost in a storm. Lieutenant Commander Johnson and several other members of the Coast Guard responded to the call for assistance; he piloted a helicopter to the area from which the distress call had been received. Visibility during the storm was quite poor, and while searching for the boat Lieutenant Commander Johnson requested radar assistance from Federal Aviation Administration (FAA) air traffic controllers. The FAA air traffic controllers provided air traffic control services to

Lieutenant Commander Johnson's helicopter, but it crashed into a mountain and all on board died. App., *infra,* 12a.

Respondent, Lieutenant Commander Johnson's widow and the administratrix of his estate, applied for and received the full range of Veterans' Benefits payable as a result of Lieutenant Commander Johnson's death.[1] In addition, respondent brought this action in the United States District Court for the Southern District of Florida under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.,* seeking damages from the United States. Respondent did not allege that Lieutenant Commander Johnson's fellow service members or superior officers acted negligently. Instead, respondent claimed that the FAA air traffic controllers negligently guided Lieutenant Commander Johnson's helicopter.

2. The district court dismissed the complaint because the injury to Lieutenant Commander Johnson arose out of activity incident to military service and therefore is barred by *Feres* v. *United States,* 340 U.S. 135 (1950) (App., *infra,* 35a). The court of appeals reversed (App., *infra,* 11a-32a). The court of appeals did not dispute that Lieutenant Commander Johnson's death occurred incident to service. But, based on its review of this Court's *Feres* doctrine cases, the court concluded that "[t]his much-maligned doctrine" (App., *infra,* 27a) is based primarily upon "the reluctance to upset, via the civilian forum, the delicate relationships which must exist for the military system to properly function" (*id.* at 28a). Applying this reasoning the court concluded that the *Feres* doctrine does not bar respondent's action because the complaint alleged the negligence of civilian FAA air traffic controllers only. In the court's view, putting on trial the

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[1] The Coast Guard advises us that respondent has received $35,690.66 in life insurance, a $3,000 death gratuity, and presently receives approximately $868 per month in dependency and compensatory benefits.

actions of civilian employees of the federal government involved in the rescue operation would not require scrutiny of military decisions or involve or compromise the military command structure (App., *infra,* 28a-29a).

The court acknowledged (App., *infra,* 29a) that its decision squarely conflicted with the Ninth Circuit's decision in *Uptegrove* v. *United States,* 600 F.2d 1248 (1979), cert. denied, 444 U.S. 1044 (1980). In *Uptegrove* a serviceman was killed when the Air Force cargo plane on which he was flying crashed, and the court concluded that the serviceman's survivor was barred by the *Feres* doctrine from alleging that the negligence of FAA air traffic controllers had caused the crash. The court below stated that "*Uptegrove* was wrongly decided" (App., *infra,* 30a).

3. The court of appeals granted the government's suggestion for rehearing en banc, but on rehearing reinstated the panel's opinion (App., *infra,* 2a). The court found that this Court's decision in *United States* v. *Shearer,* No. 84-194 (June 27, 1985), reinforced the panel's analysis. The court noted that the Court in *Shearer* placed a "[s]pecial emphasis * * * upon military discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions" (App., *infra,* 2a-4a). Like the panel, the en banc court reasoned that the "claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration * * * who were not in any way involved in military activities" (App., *infra,* 5a) so that, in the court of appeals' view, a trial here would not require civilian courts to second-guess military decisions.

Judge Johnson, joined by Judges Tjoflat, Roney, and Hill, dissented. They would have affirmed the dismissal of the complaint on the basis that the injury to Lieutenant Commander Johnson arose out of activity incident to military service and therefore was barred by *Feres.* The majority's contrary result, Judge Johnson noted, directly

conflicted with the decisions of numerous other courts of appeals which have uniformly applied *Feres* to bar actions by service members based on the alleged negligence of civilian employees of the federal government (App., *infra,* 7a-8a). Judge Johnson also relied directly on this Court's *Feres* doctrine cases since the Court had never limited the application of *Feres* to military tortfeasors. Rather this Court has stated that " '*Feres* * * * held that an on-duty serviceman who is injured due to the negligence of *Government officials* may not recover against the United States under the Federal Tort Claims Act' " (App., *infra,* 10a (emphasis in original) (Johnson, J., dissenting), quoting *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666, 669 (1977)). Thus, Judge Johnson reasoned, the proper inquiry in this case is "whether or not [the] serviceman's injury was incident to service" (App., *infra,* 10a), and he concluded that Lieutenant Commander Johnson's death necessarily was incident to service since it occurred "in the course of duty on a regular Coast Guard mission" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The court of appeals incorrectly decided a question of exceptional importance to all of the armed services and the federal agencies that regularly work with the armed services. The court's holding that a service member injured incident to military service may evade the *Feres* doctrine by alleging the negligence of civilian employees of the federal government involved in a military mission conflicts with the decisions of all of the other courts of appeals that have considered the issue and is inconsistent with the purposes and policies that underlie the *Feres* doctrine. The court of appeals' decision will have a substantial effect on the United States because military personnel frequently work jointly with civilian employees of the federal government (see pages 10-11, *infra*). Until the decision below, it was

clear that the *Feres* doctrine bars an FTCA action by a service member alleging negligence of a civilian government employee if the service member was injured incident to service. Given the pervasive nature of civilian involvement with the armed forces, it is inevitable that service members injured incident to service will now try frequently to circumvent *Feres* by alleging the negligence of federal civilian employees. Thus, if left to stand, the court of appeals' decision will greatly expand the liability of the United States for the injuries that inevitably occur in military activities. In these circumstances review of this recurring question is plainly warranted.

1. In *Feres* v. *United States,* 340 U.S. 135 (1950), the Court held that a service member "may not recover under the Federal Tort Claims Act for injuries which 'arise out of or are in the course of activity incident to service' " (*United States* v. *Shearer,* No. 84-194 (June 27, 1985), slip op. 4-5 (quoting *Feres,* 340 U.S. at 146)). That language clearly suggests that the proper inquiry is simply whether an injury occurred incident to service and that the status of the alleged tortfeasor is irrelevant. The panel below, whose decision was reinstated by the en banc court, expressly acknowledged (App., *infra,* 29a) that its holding conflicted with the Ninth Circuit's decision in *Uptegrove,* where the court held that a serviceman was barred from suing the United States on account of the alleged negligence of FAA air traffice controllers because the injury occurred incident to military service. In fact, as the dissenting judges below recognized (App., *infra,* 7a-8a), the courts of appeals have held without exception that the *Feres* doctrine bars FTCA actions by service members injured incident to service by the alleged negligence of civilian employees of the federal government. *Warner* v. *United States,* 720 F.2d 837 (5th Cir. 1983); *Carter* v. *City of Cheyenne,* 649 F.2d 827 (10th Cir. 1981); *Uptegrove* v. *United States, supra; Woodside* v. *United States,* 606 F.2d

134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980); *Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159 (5th Cir. 1975); *United States* v. *Lee,* 400 F.2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969); *United Air Lines* v. *Wiener,* 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964); *Layne* v. *United States,* 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962); *Watkins* v. *United States,* 462 F. Supp. 980 (S.D. Ga. 1977), aff'd, 587 F.2d 279 (5th Cir. 1979). The court of appeals' ruling cannot be reconciled with these numerous decisions, many of which, like this case, involved claims by service members that FAA air traffic controllers acted negligently. See *Carter,* 649 F.2d at 828; *Uptegrove,* 600 F.2d at 1249; *Lee,* 400 F.2d at 559; *United Air Lines,* 335 F.2d at 396-397; *Layne,* 295 F.2d at 433.[2] Indeed, until the decision of the court of appeals, "no court * * * has allowed recovery against the government in this sort of suit" (App., *infra,* 7a (Johnson, J., dissenting)).[3]

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[2] Each of the cases cited as conflicting with the decision below involved a claim of negligence on the part of a civilian who was not employed by the Department of Defense or in the military chain of command. The courts of appeals have uniformly held that the *Feres* doctrine applies where a service member bases a claim on the actions of civilian employees of the United States who, unlike FAA personnel, are employed by the Department of Defense or are in the military chain of command (see, *e.g., Jaffee* v. *United States,* 663 F.2d 1226, 1238 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982); *Hass* v. *United States,* 518 F.2d 1138, 1141 (4th Cir. 1975)), but we do not understand the court of appeals to have disagreed with such decisions. Cases alleging negligence on the part of civilians employed by the Department of Defense or in the military chain of command would fall into what the panel described as "the *Feres* factual paradigm" (App., *infra,* 25a), and therefore it appears that even the Eleventh Circuit would hold such suits barred by *Feres* if the injury occurred incident to military service.

[3] The district courts likewise are unanimous in holding that the *Feres* doctrine bars such a suit. *Gilardy* v. *United States,* No. 83-1277 (D. Hawaii June 13, 1984), appeal pending, No. 84-2269; *Sigler* v.

In uniformly holding such claims to be barred, the courts of appeals other than the court below have correctly applied this Court's *Feres* doctrine cases. Nothing in this Court's opinions suggests that the *Feres* doctrine bars only suits alleging negligence on the part of military personnel. To the contrary, although the plaintiffs in *Feres* were injured by other service members, the Court's opinion contained "no reference, except as a mere statement of fact, to the military status of the primary tort feasors, and certainly no reliance on that fact" (*Sheppard,* 294 F. Supp. at 8). Indeed, rather than limiting its ruling to the tortious acts of fellow service members, the Court broadly ruled that "[w]e know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers *or the Government he is serving*" (*Feres,* 340 U.S. at 141 (footnote omitted; emphasis added)). Similarly, in *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977), the Court, in holding that a private contractor who paid damages to a serviceman may not sue the United States for indemnity, reaffirmed that "[i]n *Feres* * * * the Court held that an on-duty serviceman who is injured *due to the negligence of Government officials* may not recover against the United States under the Federal Tort Claims Act" (431 U.S. at 669 (emphasis added)); see also *id.* at 673 ("at issue would be the degree of fault, if any, on the part of the *Government's agents* and the effect upon the serviceman's safety" (emphasis added)).[4]

LeVan, 485 F. Supp. 185 (D. Md. 1980); *Frazier* v. *United States,* 372 F. Supp. 208 (M.D. Fla. 1973); *Sheppard* v. *United States,* 294 F. Supp. 7 (E.D. Pa. 1969). In *Gilardy* the en banc Ninth Circuit has stayed the appeal pending the disposition of the petition in this case.

[4] This Court's decision in *Brooks* v. *United States,* 337 U.S. 49 (1949), further buttresses the conclusion that the *Feres* doctrine applies to injuries incident to service caused by the alleged negligence of civilian employees of the federal government. In *Brooks* a serviceman was killed when his car was struck by a truck driven by a civilian

2. To support its departure from the decisions of the other courts of appeals, the court below relied on its analysis of the policies which underlie the *Feres* doctrine. We submit, however, that those policies clearly support the application of *Feres* to this case.

a. This Court recently stated that the *Feres* doctrine is " 'best explained by the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty" ' " (*Shearer,* slip op. 5, quoting *United States* v. *Muniz,* 374 U.S. 150, 162 (1963)). The court of appeals concluded that these concerns were inapplicable in this case because respondent had alleged negligence on the part of civilians only. However, the court's belief that a trial here would not disrupt military discipline and effectiveness or call for scrutiny of military decisions is wholly unrealistic. Cases such as this will inevitably "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer*, slip op. 7) and "require

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employee of the United States (see *id.* at 50). The Court held that the serviceman could bring an FTCA action. However, the Court did not rely upon the fact that the tortfeasor was a civilian employee of the United States. Instead, the Court ignored the civilian status of the tortfeasor and focused on the fact that the injury occurred off-base while the serviceman was on leave and had no connection to the military—*i.e.*, that the injury was not "incident to * * * Brooks' service" (*id.* at 52). In subsequent decisions the Court has reaffirmed that the result in *Brooks* in no way hinged on the fact that the tortfeasor was a civilian employee of the government, by adverting only to the fact that the injury there was not incident to military service. See *Shearer,* slip op. 6; *United States* v. *Brown,* 348 U.S. 110, 113 (1954); see also *Hass* v. *United States,* 518 F.2d 1138, 1141-1142 n.4 (4th Cir. 1975).

members of the Armed Services to testify in court as to each other's decisions and actions" (*Stencel*, 431 U.S. at 673). Therefore, the court of appeals erred in permitting respondent to go forward with her claim; it should have affirmed the district court's dismissal of the case because Lieutenant Commander Johnson's death occurred incident to service.[5]

Civilians frequently play a critical role in numerous military missions and operations, as this case illustrates. In guiding Lieutenant Commander Johnson's helicopter, FAA air traffic controllers were called upon to assist in what was obviously a dangerous military operation. Indeed, civilian employees of the FAA frequently are called upon to participate in a wide range of important military operations. FAA air traffic controllers participate in war games and exercises and help to assure the defense of the nation by assisting the armed forces in the interception of unknown aircraft entering United States airspace. See FAA, U.S. Dep't of Transp., *Order 7610.4F: Special Military Operations* 36, 106, 123-124, 134 (Jan. 21, 1981).[6] FAA air traffic controllers also work closely with the Strategic Air Command; they assist in the guidance of United States' aircraft equipped to fire nuclear weapons and the guidance of those aircraft which direct the firing of our land-based nuclear missiles (*id.* at 32). FAA con-

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[5] As we will show (pages 11-14, *infra*), it is clear that military discipline and effectiveness would be hindered by a trial in this case. However, we do not think that courts should inquire in each case as to whether a trial will involve sensitive military affairs or require members of the armed forces to testify against each other. Rather, because trials arising from injuries occurring incident to military service will often disrupt military discipline and effectiveness, the courts of appeals have properly held (see pages 6-7, *supra*) that if an injury occurred incident to service then a claim against the government is barred, as the Court stated in *Feres*.

[6] We have lodged a copy of this FAA Order with the Clerk of the Court and served a copy on opposing counsel.

trollers frequently are stationed at military bases (*id.* at 29, 30), and even where military controllers are stationed at military facilities, FAA civilian controllers are responsible for evaluation and review of military control facilities (*id.* at 28). Thus, the FAA is involved in many of our nation's most important and sensitive military activities. As both the FAA and the armed services have concluded, "[t]he cooperation and active participation of the FAA is essential to the effective accomplishment of [these military] mission[s]" (*id.* at 40; see also *id.* at 17, 34, 36).[7]

It follows that allowing suits by service members against FAA air traffic controllers would disrupt a working relationship which is crucial to the general defense and national security and "would be just as disruptive of harmonious relations as would a suit against a fellow serviceman" (*Hass,* 518 F.2d at 1143). Disruption of this relationship would result from the tension that would inevitably arise when a service member hales into court those civilians who work in military operations. The Court in

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[7] Numerous other civilian agencies of the federal government work with the armed forces in a variety of military operations and activities, such as the Department of Energy (see 42 U.S.C. 2034-2038 (joint Department of Energy and military efforts to develop, manufacture, and store nuclear weapons)), the National Aeronautics and Space Administration (see 42 U.S.C. 2451(c)(6), 2473(c)(12); 42 U.S.C. (& Supp. II) 2452 (authorizing NASA to make available to the military discoveries having military significance, to undertake research on and construction of aircraft and missiles, and to enter into cooperative agreements with the armed services to permit military personnel to participate in NASA activities)), the Central Intelligence Agency (see 50 U.S.C. 403(d)(3); Exec. Order No. 12,333, §§ 1.11(d), 1.12, 3 C.F.R. 207-209 (1982) (CIA and military joint operations in intelligence activities)), the National Oceanic and Atmospheric Administration (see 10 U.S.C. 4537, 9537 (NOAA assistance to the military in making topographic surveys, making maps for military purposes, and researching and developing aerial photography)), and the Maritime Administration (see 46 U.S.C. 1125; 50 U.S.C. (& Supp. II) App. 1744 (acquisition of vessels for military use by the Maritime Administration with the approval of the Secretary of the Navy)).

Chappell v. *Wallace*, 462 U.S. 296, 300 (1983) cautioned that in military life "the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." To insure the success of military missions, it is important that civilians participating in the mission "be ready to provide an effective defense on a moment's notice" (*Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 5), and act without hesitation or debate. Permitting service members to challenge the decisions of civilians working with the armed services on military missions might cause some civilians to hesitate before acting and therefore interfere with military effectiveness.[8]

Apart from ignoring the ways in which this litigation would interfere with military effectiveness, the court of appeals erred in its suggestion (App., *infra*, 28a-29a) that since only the negligence of civilian employees was alleged, there will be no need for military officials to testify or for a court to scrutinize decisions made by military personnel. It would be impossible for a trier of fact to evaluate the conduct of the FAA air traffic controllers in this case without considering the military nature of the mission. At trial, the United States would be required to show that the FAA controllers acted reasonably, which would require

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[8] Additionally, if civilian negligence may be a basis for an FTCA action by a service member, it would arguably seem to follow that civilian employees may be liable for damages in their individual capacity in suits by service members. See *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983); *Uptegrove*, 600 F.2d at 1249. Calling civilians into court to account for decisions they made in a military mission and exposing them to damage awards in their individual capacity, while their military counterparts—who may be more responsible or culpable—are immune from scrutiny can only breed discord and tension in this important relationship. Certainly "it would be absurd to hold [civilians] responsible for conduct that may have been dictated by a [military] officer who is himself immune from liability" (*Hass*, 518 F.2d at 1143).

testimony describing the hazardous nature of the conditions, the extreme danger involved in any rescue mission, and the pressing need to fly in weather not suited for civilian aircraft—the peculiar demands of the military " 'without counterpart in civilian life' " (*Chappell,* 462 U.S. at 300, quoting *Schlesinger* v. *Councilman,* 420 U.S. 738, 757 (1975)). Such testimony would necessarily come from military personnel. Indeed, because under respondent's theory no liability could arise from the decisions of military personnel, to defend such cases the United States would be *forced* in some cases to place on trial military decisions—*i.e.,* to prove that the civilian defendants were not negligent but that the military officials were, since their negligence could not be a basis for liability. That would require superior officers and military personnel to testify regarding their own military decisions and the decisions of others and likewise demand that civilian courts assess the fault of military personnel. This intrusive inquiry obviously would be destructive of military morale and strike at the heart of the " 'peculiar and special relationship of the soldier to his superiors' " (*Shearer,* slip op. 5, (quoting *United States* v. *Muniz,* 374 U.S. at 162)).

Moreover, it is inevitable that cases involving dangerous military operations will raise questions of contributory negligence, again requiring service members to testify against each other and a judicial assessment of military judgments. In cases arising from military air accidents, pilot error will often be the cause of the accident. Therefore, in order to defend in some cases the United States would be required to argue that the pilot acted negligently, which might require the pilot's fellow service members and superior officers to second-guess the pilot's actions. And to rebut any adverse testimony from his superior officers and fellow soldiers, the service member might have to hale into court other superior officers or fellow soldiers to show that he or she acted prop-

erly, or that the other superior officers or fellow service members who testified were biased. It is difficult to conceive of a trial that would be more disruptive of the "established relationship between enlisted military personnel and their superior officers" (*Chappell,* 462 U.S. at 300).

The court of appeals concluded that military discipline and effectiveness would not be impaired because the FAA air traffic controllers "were not in any way involved in military activities" (App., *infra,* 5a). But that statement is refuted by the undisputed facts of this case. The FAA air traffic controllers were charged with aiding the Coast Guard—"a military service and a branch of the armed forces of the United States" (14 U.S.C. 1)—in what was clearly a dangerous military rescue mission.[9] Obviously, participation by such civilian employees contributes, in the aggregate, to the safety and effectiveness of such military operations—in comparison with attempting to carry out such operations without any help from civilian personnel (and thus with no possibility of a claim not barred by *Feres*). The reality is that, in carrying out military operations, the United States government acts as an entity and the armed services often rely upon civilian agencies for assistance. Thus, military activities are not simply the actions of the armed forces, but are interrelated actions taken by and on behalf of the United States through all of its agents. It follows that the rule in *Feres* cannot reasonably be limited only to claims of tortious conduct by military personnel, but must also include challenges to the

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[9] The court of appeals acknowledged that the *Feres* doctrine would bar an action where the tortfeasor is "a civilian employee engaged in activities usually associated with the armed forces" (App., *infra,* 25a). Given the facts of this case, as well as the numerous other military operations engaged in by the FAA, there can be no doubt that the court of appeals erred in concluding that the FAA controllers were not performing activities usually associated with the armed forces (*ibid.*).

conduct of civilians who are necessarily involved in activities "incident to military service." See *Carter,* 649 F.2d at 830-831; *Woodside,* 606 F.2d at 141; *Uptegrove,* 600 F.2d at 1250-1251; *Watkins,* 462 F. Supp. at 985; *Layne,* 295 F.2d at 435-436. The *Feres* doctrine therefore should be applied to bar respondent's action because it is "the *type* of claim[] that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer,* slip op. 6-7 (emphasis in original)).

b. Apart from concerns about adverse effects on military discipline and effectiveness, the Court in *Feres* noted that service members injured incident to service receive compensation under the Veterans' Benefits Act, which provides "simple, certain, and uniform compensation for injuries or death of those in armed services" (*Feres,* 340 U.S. at 144 (footnote omitted)). After Lieutenant Commander Johnson's accident, respondent applied for and received the full range of Veterans' Benefits (see note 1, *supra;* see also 38 U.S.C. (& Supp. II) 301-362, 401-432, 701-788). This Court has stated that where a service member is injured incident to service, Veterans' Benefits are the "exclusive" and "sole remedy" (*Hatzlachh Supply Co.* v. *United States,* 444 U.S. 460, 464 (1980)). In *Feres* the Court reasoned that because Congress, in enacting Veterans' Benefits statutes, has created "a comprehensive system of relief * * * for [service members] and their dependents" (340 U.S. at 140), Congress would not also have intended service members to recover under the FTCA for injuries incident to military service (see *id.* at 144; cf. *Chappell,* 462 U.S. at 302-303).[10] In *Stencel* the Court

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[10]In holding that Veterans' Benefits were the exclusive remedy for injuries incident to service, the Court in *Feres* distinguished its prior decision in *Brooks,* where a serviceman had been paid Veterans' Benefits for an injury but nonetheless was allowed to maintain an

stressed that "the Veterans' Benefits Act establishes, as a *substitute for tort liability,* a statutory 'no fault' compensation scheme * * * * * [that] provides an upper limit of liability for the Government as to service-connected injuries" (431 U.S. at 671, 673 (emphasis added)).

In disregarding respondent's receipt of Veterans' Benefits,[11] the court of appeals' decision contravenes the important policies which underlie the comprehensive statutory compensation scheme. Activities that are incident to service are likely to be extremely dangerous, as this case illustrates. Lieutenant Commander Johnson was called upon to participate in a military rescue operation and, unfortunately, injuries inevitably arise out of such risky operations. The court of appeals' opinion, which exposes the United States to damages for injuries incident to such hazardous military missions, removes the " 'protective mantle of the Act's limitation-of-liability provisions' " (*Stencel,* 431 U.S. at 673, quoting *Cooper Stevedoring Co. v. Kopke, Inc.,* 417 U.S. 106, 115 (1974)), and thereby "frustrat[es] one of the essential features of [that scheme]" (*ibid.*) in cases where the injury can be traced to the negligence of a civilian working with the military.

FTCA action. The Court in *Feres* saw as a "vital distinction" (*Feres,* 340 U.S. at 146) the fact that "[t]he injury to Brooks did not arise out of or in the course of military duty" (*ibid.*).

[11] The court of appeals rejected respondent's claim that the receipt of Veterans' Benefits is irrelevant in applying *Feres* (App., *infra,* 20a-21a & n.4), but the court nonetheless disregarded the fact that respondent is receiving Veterans' Benefits in reaching its decision. This Court has cautioned that factors other than the concern with military discipline and effectiveness are "no longer controlling" in *Feres* doctrine cases (*Shearer,* slip op. 6 n.4). But that hardly indicates that they may be totally disregarded. Indeed, this Court and the courts of appeals have repeatedly relied on the fact that a plaintiff is receiving Veterans' Benefits in applying *Feres.* See *Shearer,* slip op. 6 n.4; *Stencel,* 431 U.S. at 672-673; *Carter,* 649 F.2d at 830; *Jaffee,* 663 F.2d at 1228; *Uptegrove,* 600 F.2d at 1250.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-5764.

FRIEDA JOYCE JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF HORTON WINFIELD JOHNSON, FOR HERSELF AND FOR THE BENEFIT OF KEVIN LEE NIX, CYNTHIA ANN JOHNSON AND TAMARA JOYCE NIX, PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Jan. 13, 1986.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

Frieda Joyce Johnson, respondent, brought this wrongful death action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680. She alleges that her husband, a helicopter pilot for the United States Coast Guard dispatched to search for a civilian boat, died as a result of the negligence of civilian Federal Aviation Administration air traffic controllers who had assumed control over the helicopter when inclement weather prevented visual navigation. The district court, relying on *Feres* v. *United States,* 340 U.S. 135, 71 S.Ct.

153, 95 L.Ed. 152 (1950), granted the government's motion to dismiss. The court of appeals reversed. 749 F.2d 1530 (11th Cir. 1985). On April 24, 1985, we granted the government's suggestion that this matter be reviewed by the *en banc* court. 760 F.2d 244 (11th Cir. 1985). Such action vacated the panel opinion. Upon consideration by the full court, the panel opinion found at 749 F.2d 1530 (11th Cir. 1985) is reinstated.

As noted in footnote 13 of the panel opinion, the Supreme Court granted certiorari in the case of *Shearer* v. *United States,* 723 F.2d 1102 (3rd Cir. 1983), *cert. granted,* ____ U.S. ____, 105 S.Ct. 321, 83 L.Ed.2d 259 (1984). On June 27, 1985, the Court announced its opinion in that case, ____ U.S. ____, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985). The opinion of the Supreme Court is most helpful to our decision herein and reinforces the analysis set forth in the panel opinion.

Shearer involved the death of an Army private, who, while off duty, was kidnapped and murdered by another serviceman who was also off duty and away from his base. The claim made under the Federal Tort Claims Act was that although the Army knew that the other serviceman was dangerous it negligently failed to control him or warn others about him. The government contended that the suit was barred by both 28 U.S.C. § 2680(h) (waiver of sovereign immunity under the Federal Tort Claims Act not applicable to claims arising out of assault and battery) and the *Feres* doctrine. Only four members of the Court found § 2680(h) applicable. Section II B of the opinion, which discussed the *Feres* doctrine, was joined in by eight members of the Court (Justice Powell did not participate in the case).[1] Special emphasis is placed upon military

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[1] 1. Section II B reads:

Our holding in *Feres* v. *United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), was that a soldier may not recover under the

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Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." *Id.*, at 146, 71 S.Ct. at 159. Although the Court in *Feres* based its decision on several grounds,

> "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.' " *United States* v. *Muniz*, 374 U.S. 150, 162 [83 S.Ct. 1850, 1857, 10 L.Ed.2d 805] (1963), quoting *United States* v. *Brown*, 348 U.S. 110, 112 [75 S.Ct. 141, 143, 99 L.Ed. 139] (1954).

The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases. Here, the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, see *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977), and whether the suit might impair essential military discipline, see *Chappell* v. *Wallace*, 462 U.S. 296, 300, 304, 103 S.Ct. 2362, 2365, 2367, 76 L.Ed.2d 586 (1983).

Respondent's complaint strikes at the core of these concerns [footnote omitted]. In particular, respondent alleges that Private Shearer's superiors in the Army "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove Andrew Heard from active military duty." App. 14. This allegation goes directly to the "management" of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman [footnote ommitted].

Respondent's case is therefore quite different from *Brooks* v. *United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), where the Court allowed recovery under the Tort Claims Act for injuries caused by a negligent driver of a military truck. Unlike the negligence alleged in the operation of a vehicle, the claim here would require Army officers "to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp.* v. *United States, supra*, 431 U.S. at 673, 97 S.Ct. at 2058. To permit this type of suit would mean that commanding officers would have to stand prepared to convince a

discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions. In *Shearer,* the Court concluded that the "[r]espondents complaint strikes at the core of these concerns" and held the claims barred by the *Feres* doctrine. ____ U.S. at ____, 105 S.Ct. at 3043 (footnote omitted).

Writing for the majority, the Chief Justice noted,

> "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."

Id. Following this command, we find that the panel opinion has given proper consideration to the *Feres* factors with particular attention to whether or not the claims asserted here will implicate civilian courts in conflicts in-

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civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But as we noted in *Chappell* v. *Wallace,* such "complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force are essentially professional military judgments.' " 462 U.S., at 302, 103 S.Ct. at 2366 quoting *Gilligan* v. *Morgan,* 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973).

Finally, respondent does not escape the *Feres* net by focusing only on this case with a claim of negligence, and by characterizing her claim as a challenge to a "straightforward personnel decision." Tr. of Oral Arg. 37. By whatever name it is called, it is a decision of command. The plaintiffs in *Feres* and *Stencel Aero Engineering* did not contest the wisdom of broad military policy; nevertheless, the Court held that their claims did not fall within the Tort Claims Act because they were the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Similarly, respondent's attempt to hale Army officials into court to account for their supervision and discipline of Private Heard must fail. ____U.S. at ____, 105 S.Ct. at 3043-44.

volving the military structure or military decisions. The claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration (a civilian administration within the Department of Transportation) who were not in any way involved in military activities. The fact that the decedent was a helicopter pilot for the United States Coast Guard is not sufficient, standing alone, to activate the *Feres* preclusion.

The judgment of the district court is REVERSED.

JOHNSON, Circuit Judge, dissenting in which TJOFLAT, RONEY, and HILL, Circuit Judges, join.

I respectfully dissent from the decision of this Court.

This case concerns a Coast Guard helicopter pilot who was killed while on a military mission in a crash allegedly caused by civilian FAA air controller negligence. Since the suit brought by this serviceman's survivor is against the United States, we are bound by the dictates of the *Feres* doctrine, which exempts the government from suit where an injury to a serviceman is "incident to service." Here, Johnson's injury was undoubtedly sustained incident to service, so under current law our decision ought to be a relatively straightforward affirmance. However, the majority finds a novel way to evade the commands of the Supreme Court—and of Fifth Circuit precedent binding on this Court—in order to reverse and allow recovery.

In the panel opinion reinstated by the full court after *en banc* consideration, the majority determines that this Court henceforth will not make the standard *Feres* inquiry—whether or not the injury was incident to service—unless something that it calls "the *Feres* factual paradigm" is present. *Johnson* v. *United States,* 749 F.2d 1530, 1537 (11th Cir. 1985). That paradigm is said to be "an FTCA suit for injuries or death allegedly caused by the negligence of a serviceman or an employee of the armed forces." *Id.* Where the paradigm does not appear, this

Court must now undertake a case-by-case assessment of each rationale behind the *Feres* doctrine to determine whether the suit in question would undercut the purposes of the FTCA. *Id.*

The majority appears to find grounds for this extraordinary methodology in a handful of cases in which courts have returned to the *Feres* rationales to examine novel situations. See *Chappell* v. *Wallace,* 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983) (black servicemen barred from suing military for damages for constitutional violations); *Stencel Aero Engineering* v. *United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977) (no third party indemnification from United States where direct suit of injured party barred by *Feres*); *United States* v. *Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963) (*Feres* does not bar prisoners' suits against United States for injuries sustained in federal prison); *Hunt* v. *United States,* 636 F.2d 580 (D.C. Cir. 1980) (manufacturer sued by servicemen unjured by defective swine flu vaccine not barred by *Feres* from bringing in United States as substitute defendant under unique liability scheme of Swine Flu Act). The majority's own opinion suggests that it is undesirable to apply these rationales case-by-case in any but extremely unusual situations. *Johnson,* 749 F.2d at 1537 ("the [*Feres*] rationales are more relevant to the wisdom of implying [sic] an exception to the FTCA in the first instance, than they are to determining whether, given a particular factual situation, a servicemen was injured 'incident to service' "). Compare *Henninger* v. *United States,* 473 F.2d 814 (9th Cir. 1973) ("[t]o determine the effect that a particular type of suit might have upon military discipline would be an exceedingly complex task. . . . [N]early every case would have to be litigated, and it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs").[1]

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[1] The Supreme Court in *Shearer* v. *United States,* ____ U.S. ____, 105 S.Ct. 3039, 3043, 87 L.Ed.2d 38 (1985), recently said, as the ma-

However, cases in which a serviceman was injured incident to service by a civilian government employee are hardly novel. This fact pattern has appeared consistently over the years. And just as consistently, no court until now has allowed recovery against the government in this sort of suit. See *Potts* v. *United States,* 723 F.2d 20 (6th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 2172, 80 L.Ed.2d 555 (1984) (Navy corpsman injured when struck by broken cable from hoist operated by civilians); *Warner* v. *United States,* 720 F.2d 837 (5th Cir. 1983) (off-duty Army enlisted man injured on base when motorcycle collided with shuttle bus driven by civilian government employee); *Jaffee* v. *United States,* 663 F.2d 1226 (3d Cir. 1981) (*en banc*), *cert. denied,* 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982) (serviceman injured by radiation exposure allegedly due in part to intentional tort of civilian Department of Defense and Atomic Energy Commission employees); *Lewis* v. *United States,* 663 F.2d 889 (9th Cir. 1981) (Marine Corps pilot killed in crash allegedly due to negligence of government maintenance employees); *Carter* v. *Cheyenne,* 649 F.2d 827 (10th Cir. 1981) (Air Force captain killed in crash at city airport for which city brought third-party claim against FAA controllers); *Woodside* v. *United States,* 606 F.2d 134 (6th Cir. 1979), *cert. denied,* 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980) (Air Force officer killed in crash of plane allegedly due to negligence of civilian flight instruc-

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jority notes, that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in the light of the statute as it has been construed in *Feres* and subsequent cases." The majority seems to read this comment as condoning case-by-case application of the *Feres* rationales. This is too broad an interpretation. The bright-line rule that the *Shearer* Court specifically rejects is the use of "the situs of the murder" as determinative. Beyond this, the Court simply affirms that each case should be examined in light of the traditional application of the exception—*not* that each case should be scrutinized under each *Feres* rationale originally supporting the FTCA exception.

tor employed by military flight club); *Uptegrove* v. *United States,* 600 F.2d 1248 (9th Cir. 1979), *cert. denied,* 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980) (serviceman killed in crash of Air Force transport due to alleged negligence of FAA air traffic controller); *Watkins* v. *United States,* 462 F.Supp. 980, *aff'd on opinion below,* 587 F.2d 279 (5th Cir. 1979) (serviceman killed on base when motorcycle collided with shuttle bus driven by civilian government employee); *Hass* v. *United States,* 518 F.2d 1138 (4th Cir. 1975) (Marine sued government, charging civilian managers of Marine stable with negligence); *Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159 (5th Cir. 1975) (suit by insuror of serviceman injured through malpractice of Public Health Service employees barred); *Bankston* v. *United States,* 480 F.2d 495 (5th Cir. 1973) (serviceman injured through Public Health Service employee malpractice); *United States* v. *Lee,* 400 F.2d 558 (9th Cir. 1968) serviceman killed in crash of military aircraft allegedly due to FAA air controller negligence); *Sheppard* v. *United States,* 369 F.2d 272 (3d Cir. 1966), *cert. denied,* 386 U.S. 982, 87 S.Ct. 1286, 18 L.Ed.2d 230 (1967) (serviceman killed in crash of military aircraft allegedly due to FAA air controller negligence) (companion case to *Lee, supra); Layne* v. *United States,* 295 F.2d 433 (7th Cir. 1961), *cert. denied,* 368 U.S. 990, 82 S.Ct. 605, 7 L.Ed.2d 527 (1962) (National Guardsman killed on training flight due to negligence of civilian air controllers); *United Air Lines* v. *Wiener,* 335 F.2d 379 (9th Cir. 1964), *cert. denied sub nom. United Airlines, Inc.* v. *United States,* 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964) (serviceman injured in part due to CAA employee negligence).

These cases are consistent with the Supreme Court's opinion in *Brooks* v. *United States,* 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed.1200 (1949), in which a serviceman was injured in an auto collision with a civilian employee of the

Army. The civilian status of the tortfeasor was apparently immaterial to the Court's decision—the only question analyzed was whether the injury was "incident to service." *See also Hass,* 518 F.2d at 1141-42 n.4 ("[i]n *Brooks* the Army truck that hit claimants' car was driven by a civilian, but the Supreme Court simply mentioned that fact in passing and placed no emphasis on it in reaching a decision").

The former Fifth Circuit cases cited above, *Watkins, Certain Underwriters,* and *Bankston,* are precedents binding on this Circuit. The majority unaccountably does not trouble to distinguish, or even to discuss, these cases. *Watkins,* which involved a suit by a serviceman injured when his motorcycle collided with a shuttle bus driven by a civilian government employee, is particularly relevant. There, the former Fifth Circuit concluded that "the fact that the injury was inflicted by non-military personnel does not bar operation of the *Feres* doctrine." *Watkins,* 462 F.Supp. at 985. What was true for Watkins is no less true for Johnson.

But even if this court simply ignores precedent—even if we decline, as the *Shearer* Court enjoins us, to examine each case in the light of the statute as it has historically been construed and accept the majority's unprecedented case-by-case methodology—the decision of the court below should be affirmed. For this case clearly would fall within the so-called "*Feres* factual paradigm" if the latter were properly framed.

In the cases considered by the *Feres* Court all three plaintiffs were injured by other servicemen. But the Court's holding was not limited to military tortfeasors. The Court said: "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or *the Government he is serving.*" *Feres* v. *United States,* 340 U.S. 135, 141, 71 S.Ct. 153, 157, 95 L.Ed. 152 (1950) (emphasis added). The Court further confirmed in *Stencel Aero Engineering*

Corp., 431 U.S. at 669, 97 S.Ct. at 2056 (emphasis added), that "[i]n *Feres* . . . the Court held that an on-duty serviceman who is injured due to the negligence of *Government officials* may not recover against the United States under the Federal Tort Claims Act." As the lower court in *Sheppard* noted, the Court's ruling in *Feres* contains "no reference, except as a mere statement of fact, to the military status of the primary tort feasors, and certainly no reliance on that fact." *Sheppard* v. *United States,* 294 F.Supp. 7, 8 (E.D.Pa. 1969), *aff'd,* 369 F.2d 272 (3d Cir. 1966), *cert. denied,* 386 U.S. 982, 87 S.Ct. 1286, 18 L.Ed.2d 230 (1967).

An exception to the FTCA must logically cover *all* government employees, since that Act concerns claims based on "the negligent or wrongful act or omission of *any employee of the Government*." Tort Claims Act, 28 U.S.C.A. § 1346(b) (1976) (emphasis added). As the Ninth Circuit said in *United States* v. *Lee,* 400 F.2d at 562:

> In the ordinary Tort Claim case, where a person with civilian status is injured or dies, the claimant has his rights under the Tort Claims Act, regardless of the civilian or military status of the individual tortfeasor. An agent of the government has committed the wrong and the government is held liable. There is no logical distinction between the status of the civilian or the military tortfeasor.

In short, the true *Feres* factual paradigm is a case in which injury to a serviceman is caused by *any* government employee. This suit falls squarely within that paradigm. The proper inquiry remaining to this Court is simply whether or not this serviceman's injury was incident to service. Since Johnson was killed in the course of duty on a regular Coast Guard mission, I conclude that his death was indeed incident to service.

Accordingy, I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-5764.

FRIEDA JOYCE JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF HORTON WINFIELD JOHNSON, FOR HERSELF AND FOR THE BENEFIT OF KEVIN LEE NIX, CYNTHIA ANN JOHNSON AND TAMARA JOYCE NIX, PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Jan. 10, 1985.

Rehearing and Rehearing En Banc Denied March 26, 1985.[*]

Before FAY and VANCE, Circuit Judges, and MAC MAHON*, District Judge.

FAY, Circuit Judge:

Frieda Joyce Johnson, plaintiff, brought this wrongful death action against the United States under the Federal Tort Claims Act (FTCA) 28 U.S.C. §§ 1346, 2671-2680. She alleges that her husband died as a result of the negligence of air traffic controller employed by the

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[* The court of appeals subsequently granted rehearing en banc. See page 2a, *supra*.]

* Honorable Lloyd F. MacMahon, U.S. District Judge for the Southern District of New York, sitting by designation.

Federal Aviation Administration (FAA). The district court, relying on *Feres* v. *United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), granted the Government's motion to dismiss. We reverse.

FACTUAL BACKGROUND[1]

Plaintiff's decedent, Horton Winfield Johnson, was a helicopter pilot for the United States Coast Guard, stationed in Hawaii. On January 7, 1982, Johnson and his aircraft were dispatched to search for a civilian boat in distress. Because inclement weather made visual navigation impossible, Johnson requested the civilian FAA controllers to assume positive radar control over the helicopter. The controllers did so and undertook guidance from the ground. Unfortunately, the helicopter was vectored into the side of a mountain on the island of Molokai. Johnson was killed in the crash.

After exhausting her administrative remedies, plaintiff brought this action on behalf of herself, her minor children, and her husband's estate, alleging negligence on the part of the civilian FAA air traffic controllers. The Government filed a motion to dismiss, arguing that since plaintiff's decedent was killed while acting within the course and scope of his military duties, the complaint failed to state a claim upon which relief could be granted under the FTCA. The district court agreed, citing only *Feres,* and dismissed the action with prejudice.[2]

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[1] Properly viewed, this case involves an appeal from an order dismissing the action for want of jurisdiction. See *infra* note 2. We therefore accept as true, for purposes of this appeal, the factual allegations contained in plaintiff's complaint. See *Radovich* v. *Nat'l Football League,* 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); *Eaton* v. *Dorchester Dev., Inc.,* 692 F.2d 727 (11th Cir. 1982).

[2] We note that the Government erroneously contended that since the *Feres* doctrine barred plaintiff's suit, the complaint failed to state a claim upon which relief could be granted. The law is clear that "since a defense based on the *Feres* doctrine is premised on the notion that

THE *FERES* DOCTRINE

Under the common law, the United States was shielded from suit by the doctrine of sovereign immunity. *See Feres,* 340 U.S. at 139, 71 S.Ct. at 156. In 1946, however, Congress enacted the FTCA, thus marking "the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Id.* The FTCA provides that the United States is liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. It also vests in the district courts exclusive jurisdiction over civil actions against the United States based on the alleged negligence of government employees "where the United States, if a private person, would be liable to the claimant [under] the law of the place where the [negligence] occurred." *Id.* § 1346(b). This consent to suit, however, was not unlimited. Congress listed exceptions to the applicability of the FTCA, *see id.* § 2680, one of which excludes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j). The text of the act does not mention a blanket prohibition on actions brought by servicemen qua servicemen, yet "the courts rushed in where legislators feared to tread." *Parker* v. *United States,* 611 F.2d 1007, 1009 (5th Cir. 1980).

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there is no jurisdiction to hear the claim as the United States has not waived sovereign immunity for that kind of suit, such [a defense] should be raised by a motion to dismiss for lack of subject matter jurisdiction." *Stanley* v. *Central Intelligence Agency,* 639 F.2d 1116, 1157 (5th Cir. 1981). It follows that a court which accepts the *Feres* doctrine defense should not also attempt to adjudicate the merits of the case. *Id.* at 1157. This, however, is precisely what occurred when the district court dismissed plaintiff's complaint with prejudice, because "[a] dismissal for failure to state a claim is a disposition on the merits." *Id.* at 1158. In light of our holding, this error is of no consequence.

Soon after the FTCA was enacted, the Supreme Court was called upon to determine the statute's impact upon suits brought by servicemen or their survivors against the United States. In *Brooks* v. *United States,* 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), a serviceman was injured when an army truck collided on a public highway with the civilian automobile in which he was a passenger. The court characterized the injury as one not incurred incident to service, and held that the clear language of the FTCA authorized the serviceman's negligence action against the United States. *Id.* at 51-52, 69 S.Ct. at 919-920.

Shortly after *Brooks* was decided, the Supreme Court had occasion to address the applicability of the FTCA to a factual situation not before the Court in *Brooks,* to wit, a suit against the United States when "each claimant, while on active duty and not on furlough, sustained injury due to the negligence of others in the armed forces." *Feres,* 340 U.S. at 138, 71 S.Ct. at 155.[3] The court in *Feres* held that the FTCA did not waive the Government's sovereign immunity for injuries to members of the armed services where the injuries arose out of or were in the course of activity incident to service. *Id.* at 146, 71 S.Ct. at 159. The court offered the following bases for its holding: (1) the absence of parallel private liability; (2) the belief that since state law must be consulted under the FTCA, it would be irrational to leave servicemen injured by others in the military dependent upon geographic considerations over which they have no control; (3) the "distinctively federal

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[3] The *Feres* decision actually involved three actions against the United States. The *Feres* case was a wrongful death action brought by the executrix of Feres' estate in which, *inter alia,* it was alleged that Feres was negligently quartered in a barracks having a defective heating plant. *Feres,* 340 U.S. at 136-37, 71 S.Ct. at 154-55. In *Jefferson* v *United States* and *United States* v. *Griggs,* the plaintiffs alleged medical malpractice on the part of military physicians. *Id.* at 137, 71 S.Ct. at 155.

character" of the relationship between the United States and those in the military; and (4) the availability of a no-fault compensation system. *Id.* at 141-46, 71 S.Ct. at 156-59.

Four years after *Feres,* the Supreme Court decided *United States* v. *Brown,* 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954). In that case Veterans Administration doctors operated on the knee of a veteran; the knee had been injured while he was on active duty. The veteran brought suit, alleging negligent medical treatment. Despite the fact that the veteran received enhanced disability benefits as a result of the surgery, the court held that his FTCA claim was not barred since the injury sued on occurred after he was discharged from service. *Id.* at 111-112, 75 S.Ct. at 142-143. The most significant aspect of the *Brown* case is not its holding; rather, it is the following statement which has come to be regarded as the single most important, and defensible, rationale for the *Feres* doctrine which has emerged as *Brown's* most significant contribution:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [*Feres*] Court to read that Act as excluding claims of that character.

Brown, 348 U.S. at 112, 75 S.Ct. at 143.

Some of the theoretical underpinnings of the *Feres* decision fell on hard times after *Brown.* For example, the view that the FTCA did not contemplate the creation of a "novel and unprecedented," *Feres,* 340 U.S. at 141, 71 S.Ct. at 157, cause of action against the United States was undermined in *Indian Towing Co.* v. *United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and *Rayonier*

Inc. v. *United States,* 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957). In *Indian Towing,* the Supreme Court refused to bar an FTCA claim based on the alleged negligence of the Coast Guard in operating a lighthouse beacon. Over a vigorous dissent arguing the applicability of *Feres, see Indian Towing,* 350 U.S. at 70, 76 S.Ct. at 127 (Reed, J., dissenting, joined by Burton, Clark, & Minton, J.J.), the court expressly rejected the Government's contention that the FTCA excluded claims based on the negligent performance of an activity unique to the government. *Id.* at 66-69, 76 S.Ct. at 125-127. The court reasoned that to premise FTCA liability on the "completely fortuitous circumstance" of "the presence or absence of identical private activity" would be to "attribut[e] bizarre motives to Congress." *Id.* at 67, 76 S.Ct. at 125. Similarly, in *Rayonier,* where the court held that an FTCA action could be maintained for the alleged negligence of federal firefighters, the court stated:

> It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its firefighters, but *the very purpose of the Tort Claims Act was* to waive the Government's traditional all-encompassing immunity from tort actions and *to establish novel and unprecedented governmental liability.*

Rayonier, 352 U.S. at 319, 77 S.Ct. at 377 (emphasis added).

The continued viability of the *Feres* doctrine was again questioned, albeit implicitly, in *United States* v. *Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963), where the Supreme Court was asked to decide whether a federal prison inmate could sue under the FTCA for personal injuries sustained while incarcerated. The Government argued that both *Feres* and the potential adverse effect liability would have on prison discipline warranted implying an exception to the FTCA so as to bar prisoner claims.

Although it was careful not to question the *Feres* doctrine in the military context, *see id.* at 159, 83 S.Ct. at 1856, the court's reasoning can arguably be seen as further erosion of the doctrine's supporting rationales. The court echoed the *Rayonier* conclusion that the absence of analogous private liability was no impediment to FTCA liability, *id.* (citing *Brown,* 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139), and also noted that "the presence of a compensation system . . . does not of necessity preclude a suit for negligence." *Muniz,* 374 U.S. at 160, 83 S.Ct. at 1856. Further, the court regarded the supposed adverse effect diverse state personal injury laws would have on prison administration as "more a matter of conjecture than reality," *id.* at 161, 83 S.Ct. at 1856, and the Government's fear that some prisoners might be prejudiced by a non-uniform right to recover was seen by the court as no excuse for denying them recovery altogether. *Id.* at 162, 83 S.Ct. at 1857. Finally, the court invoked the gloss placed on *Feres* in *Brown,* and stated that *Feres* was "best explained" by the fear of what might happen if FTCA suits questioning orders given or acts committed in the course of military duty were allowed, as well as the effect intramilitary litigation might have on the soldier-superior relationship and military discipline. *Id.* (quoting *Brown,* 348 U.S. at 112, 75 S.Ct. at 143). Applying this "explanation" to the facts before it, the court in *Muniz* concluded that while it was possible that litigating prisoner claims would damage prison discipline, the spectre raised by the Government was more hypothetical than real. *Muniz,* 374 U.S. at 163, 83 S.Ct. at 1858. The court accordingly allowed the plaintiff to pursue his FTCA claim.

Despite the apparent inroads on the theoretical predicates of the *Feres* doctrine, *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), made it abundantly clear that the doctrine "refused to die the quiet death that some had an-

ticipated." *Hunt* v. *United States,* 636 F.2d 580, 588 (D.C. Cir. 1980). In *Stencel,* a serviceman injured when an aircraft ejection system malfunctioned brought suit against the United States and Stencel, the manufacturer of the system. Stencel cross-claimed against the Government for indemnity alleging, *inter alia,* that any malfunction in the ejection system was due to the Government's provision of faulty specifications, requirements, and components. Both the district court and the Eighth Circuit concluded that the serviceman's claim against the United States and Stencel's cross-claim were barred by the *Feres* doctrine. *Stencel,* 431 U.S. at 669, 97 S.Ct. at 2056. Stencel appealed.

To decide whether to allow Stencel's cross-claim when the serviceman's claim against the Government was barred by the *Feres* doctrine, *see id.* at 673, 97 S.Ct. at 2058-2059, the court found it necessary to examine the doctrine's supporting rationales. In doing so, the court "dusted off and reasserted," *Parker,* 611 F.2d at 1011, some of the factors mentioned in *Feres* and thought discredited by intervening decisions. *See id. Hunt,* 636 F.2d at 588. The court identified three factors it apparently considering controlling in *Feres* doctrine analysis: (1) the distinctively federal character of the relationship between the soldier and the sovereign; (2) the existence of a no-fault statutory compensation scheme which serves as a substitute for governmental tort liability; and (3) the *Brown* court's concern about the effect on the military disciplinary structure that would obtain if tort litigation were countenanced. *Stencel,* 431 U.S. at 670-73, 97 S.Ct. at 2057-59. The court applied each of these factors to the cross-claim indemnity situation, and concluded that the FTCA did not authorize Stencel's claim "for essentially the same reasons that the direct action by [the serviceman] is barred by *Feres.*" *Id.* at 673, 97 S.Ct. at 2059.

That *Stencel* was not a jurisprudential aberration was recently confirmed in *Chappell* v. *Wallace,* 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 568 (1983). In that case, five Navy enlisted men who served on board a combat vessel brought suit against several of their superiors, alleging unconstitutional discrimination. The court acknowledged that *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), authorized damage suits against federal officials for constitutional violations in the absence of "special factors counselling hesitation." *Chappell,* 103 S.Ct. at 2364 (quoting *Bivens,* 403 U.S. at 396, 91 S.Ct. at 2005). The court therefore undertook to locate any such factors. Enter *Feres.*

The court in *Chappell* found that "[t]he 'special factors' that bear on the propriety of [plaintiffs'] *Bivens* action also formed the basis of this Court's decision in *Feres.*" *Chappell,* 103 S.Ct. at 2364. It then catalogued three of the bases of the *Feres* doctrine: (1) the lack of congressional intent to create a new cause of action with the FTCA; (2) the existence of a statutory compensation system for members of the armed services who are injured or killed; and (3) the unique relationship of the soldier to his superior, and the effect of intramilitary litigation on discipline. *Id.* at 2364-65. Although the court in *Chappell* referred to these three rationales for the *Feres* doctrine as guiding its analysis, its emphasis was clearly on the third factor. *See Brown* v. *United States,* 739 F.2d 362, 365 (8th Cir. 1984). The court focused its analysis on the military's unique need for discipline, the existence of military alternatives to civilian judicial review, and Congress' plenary constitutional authority over the military, and concluded that "special factors" did indeed militate against providing enlisted military personnel a *Biven's*-type remedy against their superiors. *Chappell,* 103 S.Ct. at 2367.

Regardless of the "widespread, almost universal criticism of *Feres* by the lower federal courts and commentators." *In re "Agent Orange" Product Liability Litigation,* 580 F.Supp. 1242, 1246-47 (E.D.N.Y. 1984) (citing *Hinkie* v. *United States,* 715 F.2d 96 (3d Cir. 1983), *cert. denied,* ____U.S. ____, 104 S.Ct. 1276, 79 L.Ed.2d 680 (1984); *Scales* v. *United States,* 685 F.2d 970 (5th Cir. 1982), *cert. denied,* 460 U.S. 1082, 103 S.Ct. 1772, 76 L.Ed.2d 344 (1983); *Hunt,* 636 F.2d 580; *Veillette* v. *United States,* 615 F.2d 505 (9th Cir. 1980); *Peluso* v. *United States,* 474 F.2d 605 (3d Cir.), *cert. denied,* 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973); Hitch, The Federal Tort Claims Act and Military Personnel, 8 Rutgers L.Rev. 316 (1954); Rhodes, The *Feres* Doctrine After Twenty-Five Years, 18 A.F.L. Rev. 24 (1976); Note, From *Feres* to *Stencel;* Should Military Personnel Have Access to FTCA Recovery?, 77 Mich.L.Rev. 1099 (1977)), it nonetheless "is beyond question that it is the law." *Brown,* 739 F.2d at 365 (quoting *Laswell* v. *Brown,* 683 F.2d 261, 265 (8th Cir. 1982), *cert. denied,* 459 U.S. 1210, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983)). We now turn to its application to the facts of this case.

APPLICATION OF *FERES* DOCTRINE

Plaintiff asserts that, despite *Stencel,* we should bite the bullet, so to speak, and jettison those rationales for the *Feres* doctrine which have been criticized over the years. According to plaintiff, whenever a court is faced with a *Feres* doctrine defense, the inquiry should be limited to the effect maintenance of the suit would have on the military disciplinary structure.[4] Since litigating her FTCA claim,

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[4] In support of this view, plaintiff contends that *Chappell* "mentions only the military discipline rationale of *Feres*, and therefore implicitly disavows the first two makeweights historically mustered in support of the *Feres* doctrine." Reply Brief of Appellant at 6. What we

which is based solely on the conduct of civilians performing a civilian service, *see infra* note 10, will not implicate "[t]he most compelling rationale for the *Feres* doctrine," *Brown,* 739 F.2d at 365, plaintiff contends that the district court should be reversed. The Government, on the other hand, essentially argues that plaintiff's suit is barred simply because her decedent was killed while performing a Coast Guard mission;[5] that the alleged tortfeasors are

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are not free to do, however, is ignore three crucial facts. First, the *Chappell* court did not confine its discussion of *Feres* to the military discipline rationale. *See supra* p. 1535. The *Chappell* court specifically referred to the *Feres* court's "focus[] on the unique relationship between the government and military presonnel." *Chappell,* 103 S.Ct. at 2365, when that court held that the FTCA did not create a new cause of action against the United States. Further, the *Chappell* court noted that the *Feres* decision was influenced by congressional " 'enactments . . . which provide systems of simple, certain, and uniform compensation for injuries or death of those in the armed services.' " *Id.* (quoting *Feres*, 340 U.S. at 144, 71 S.Ct. at 158). Second, the reasoning employed by the *Chappell* court. The court was acutely aware that it was being asked to countenance a *Bivens* remedy in an area over which Congress exercised plenary constitutional authority, *Chappell,* 103 S.Ct. at 2365-67. Moreover, the decision in *Chappell* was informed by the existence of (1) statutes regulating military life; (2) a comprehensive military justice system; and (3) a civilian board which is empowered to review a serviceman's military record. *Id.* at 2366-67. Surely these factors are analogous to the first two *Feres* doctrine rationales. Third, even if the *Chappell* court had completely ignored these rationales, which it did not, we would be hard pressed to infer from that fact a "disavowal" of them. In *Chappell* the named defendants were individual naval officers, not the United States. Therefore, it is arguable that the rationale concerning the distinctively federal relationship between the United States and its servicemen is inapposite. Also, the failure to discuss a military compensation system for injuries or death would be understandable given the fact that this system hardly could be used as a substitute for money damages for racial discrimination. In short, we are not able to read *Chappell* as broadly as does the plaintiff.

[5] The Government correctly notes that the Coast Guard is considered to be a military service and branch of the armed forces at all

civilian employees of the FAA who were acting in purely civilian capacities when the alleged tort occurred is, in the Government's view, wholly irrelevant. Although we reach the result sought by the plaintiff, we need not decide whether the approach she advances is appropriate when the tort sued upon is based on the conduct of a member of the military.[6] We also decline the Government's invitation

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times, 14 U.S.C. § 1, and that when serviceman Johnson was killed he was fulfilling one of the Coast Guard's primary duties. By statute, the Coast Guard is required to establish and maintain "rescue facilities for the promotion of safety on . . . the high seas and waters subject to the jurisdiction of the United States." *Id.* § 2. To discharge this responsibility, the Coast Guard is authorized to "perform any and all acts necessary to rescue and aid persons and protect and save property." *Id.* § 88(a)(1). The unique facts of this case, however, present a rather interesting wrinkle. Absent a declaration of war or presidential directive, the Coast Guard is a service in the Department of Transportation, not the Navy. *Id.* §§ 1 & 3. As a consequence, serviceman Johnson and the alleged tortfeasors were employees of the same department. *See infra* note 10.

[6] As we understand it, plaintiff's position is that even if the serviceman's injuries are caused by the negligence of others in the military, the court should examine the facts of the case to see if maintenance of the suit would threaten the military disciplinary structure. A review of the law in this area reveals that this position has its advocates. The Ninth Circuit, for example, in *Johnson* v. *United States,* 704 F.2d 1431 (9th Cir. 1983), did conduct such an inquiry in determining whether an active duty serviceman who was injured by another active duty serviceman was engaging in activities incident to his service at the time of his injury. After discounting the first two rationales for the *Feres* doctrine as set forth in *Stencel,* the *Johnson* court stated that "the necessity of safeguarding military discipline provides the most fundamental rationale for limiting recovery under the FTCA to injuries that are not incident to military service." *Id.* at 1436. After viewing the facts of the case "in light of [this] underlying disciplinary rationale." *id.,* the court allowed the FTCA claim to proceed, since "the civil litigation of negligence claims such as Johnson's could not possibly have any effect whatsoever on military discipline." *Id.* at 1439; *see Lee* v. *United States,* 261 F.Supp. 252, 256 (C.D.Cal.1966) (cited in *Stanley,* 639 F.2d at 1152), *rev'd,* 400 F.2d

558 (9th Cir. 1968), *cert. denied,* 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969); *Downes* v. *United States,* 249 F.Supp. 626, 628 (E.D.N.C. 1965) (To determine whether a serviceman was injured incident to military service, the real question is: "Was plaintiff performing duties of such a character as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries resulting therefrom?"), *see also Brown,* 739 F.2d at 366 (To decide whether a serviceman was engaged in activity incident to service when injured, the court must "examine the facts of each case . . . and determine whether they fall within the reasons given by the Supreme Court for its conclusion in *Feres.*") (quoting *Miller* v. *United States,* 643 F.2d 481, 493 (8th Cir. 1981) (en banc)); *cf. Stanley,* 639 F.2d at 1152 (serviceman's FTCA claim barred by *Feres* doctrine in part because "the relationship betweeen [the plaintiff] and the alleged negligent individuals stemmed from their official military relationship"). *But see Torres* v. *United States,* 621 F.2d 30, 32 (1st Cir. 1980) (*Feres* doctrine bars FTCA suit "even in the absence of a clear nexus between the injury and military discipline") (citing *Hall* v. *United States,* 451 F.2d 353 (1st Cir. 1971)); *Uptegrove* v. *United States,* 600 F.2d 1248 (9th Cir. 1979), *cert. denied,* 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980); *United States* v. *Lee,* 400 F.2d 558 (9th Cir. 1968), *rev'g* 261 F.Supp. 252 (C.D.Cal. 1966), *cert. denied,* 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969).

Sound as this approach might be, we do not feel it is necessary in this instance because we are not faced with a typical *Feres* factual paradigm. We do note that some courts have not embraced a case-by-case inquiry into whether allowing a particular suit would threaten military discipline. *See Hunt,* 636 F.2d at 599 n.51; *Hall,* 451 F.2d at 354 ("If every injury 'aris[ing] out of or . . . incident to service.' [*Feres*], 340 U.S. at 146, 71 S.Ct. at 159, must invite inquiry, not only would the difficulties of what, legally, would constitute discipline-connected be substantial, but the Armed Services would be faced with maintaining a claims department."). Arguably, *Parker,* 611 F.2d 1007, also suggests that any such case-by-case inquiry is inappropriate when the alleged tortfeasor is a member of the armed services. *See infra* pp. 1537-1538. We feel free to conduct such an inquiry here, however, since we must determine "whether, *as a general question of law,* the *Feres* doctrine should be extended to" (*Hunt,* 636 F.2d at 599 n.51 (emphasis added)), a factual situation radically different from the typical *Feres* doctrine case, where the alleged tortfeasor is a member of the armed services. *See infra* pp. 1538-1539. The alleged tortfeasor here is a civilian.

to affirm the district court in automaton fashion.

Parker, 611 F.2d 1007, is the appropriate analytical point of departure. In that case, Parker, an off-duty serviceman who was driving a civilian vehicle to his off-base home, was killed in a collision with a military vehicle driven by another serviceman. The accident occurred on an army maintained road within the confines of the military base where Parker was stationed. Earlier that day, Parker had received permision to be away from his duties for the next four days. The court framed the issue as whether, in these circumstances, Parker was engaged in activities incident to his military service at the time of his death. *Id.* at 1009. After examining Parker's duty status at the time of the accident, the location of the accident, and what he was doing when the accident happened, the court concluded that the wrongful death action was not barred by the *Feres* doctrine. *Id.* at 1013-15.

Both parties rely on *Parker* in support of their positions.[7] Contrary to plaintiff's understanding of that decision, however, the *Parker* court did not hold as it did because allowance of the suit would not directly implicate any of the *Feres* doctrine rationales as elucidated in *Stencel.* Rather, the court specifically noted that the "Distinctively Federal Character" and "Relation of Soldier to Superiors" rationales are more relevant to the

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[7] Plaintiff argues that lurking between the lines in *Parker* is a rejection of the first two factors identified in *Stencel* as supporting the *Feres* doctrine, even though the *Parker* court acknowledged that *Stencel* "reaffirmed that the doctrine lives." *Parker,* 611 F.2d at 1010. Since maintaining the suit in *Parker* was seen as not interfering with military discipline, *see id.* at 1013, and the FTCA suit was allowed in that case, plaintiff suggests that *Parker* dictates the same result here. Predictably, the Government views *Parker* as support for its position because, unlike the situation in that case, plaintiff's decedent was piloting a Coast Guard helicopter pursuant to orders from his superiors at the time of his death. The simplicity of both positions is appealing, but *Parker* stands for neither position.

wisdom of implying an exception to the FTCA in the first instance, than they are to determining whether, given a particular factual situation, a serviceman was injured "incident to service." *Id.* at 1012-13. Similarly, the alternative compensation rationale was of no particular relevance to the court's inquiry since the compensation system is deemed to be the exclusive remedy for a serviceman's injuries only when the injuries are a result of activity that is incident to service. *Id.* at 1012.

This does not mean, however, that *Parker* supports the Government's position. The facts in *Parker,* and nearly all the cases decided by reference to *Feres,* involved the typical *Feres* factual paradigm—an FTCA suit for injuries or death allegedly caused by the negligence of a serviceman or an employee of the armed forces. *See, e.g. Brooks,* 337 U.S. at 50, 69 S.Ct. at 919 (negligence of civilian employee of the United States Army); *Feres,* 340 U.S. at 138, 71 S.Ct. at 155 ("negligence of others in the armed forces"); *Brown,* 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (negligence of Veterans Administration medical personnel). As we see it, the teaching of *Feres* and its progeny, notably *Parker,* is that when the *Feres* factual paradigm is present, the issue is whether the injury arose out of or during the course of an activity incident to service. *See Feres,* 340 U.S. at 146, 71 S.Ct. at 159. If, however, the alleged tortfeasor is not a member of the armed forces or a civilian employee engaged in activities usually associated with the armed forces, we conclude that a court should consult the *Feres* doctrine rationales as set forth in *Stencel* "to determine to what extent, if any, allowance of [the] claim would circumvent the purposes of the [FTCA] as . . . construed by the [Supreme] Court." *Stencel,* 431 U.S. at 670, 97 S.Ct. at 2057. This approach is not novel. The Supreme Court, in those situations not fitting neatly into the *Feres* factual paradigm, has found it entirely appropriate to inquire if the doctrine's rationales

applied with equal vigor to the facts before is so as to justify immunizing the government or a governmental official from liability. The *Chappell, Stencel,* and *Muniz* courts employed this analysis.

Our decision to employ such an approach is further buttressed by a particularly instructive case, *Hunt v. United States*, 636 F.2d 580 (D.C.Cir.1980). In *Hunt*, three plaintiffs brought suit alleging that mandatory swine flu inoculations received while on active duty caused them serious illness. As in this case, a rigid literal reading of *Feres* would have required barring the plaintiffs' claims against the United States since the plaintiffs were on active duty when required to do that which eventually caused them the harm sued upon. Yet the *Hunt* court resisted the temptation to automatically extend the *Feres* bar to a factual situation not akin to the *Feres* factual paradigm.[8] The court instead found that the *Feres* doctrine was not directly applicable. *Id.* at 597. It therefore felt impelled to "examine the policies on which the [*Feres*] doctrine rests to determine whether its application would be appropriate," *id.*, given the unique facts presented. The court concluded that none of the policies behind the *Feres* doctrine, "[a]s recapitulated in *Stencel,*" *id.*, supported exempting the

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[8] Briefly put, the swine flu imminization program established that a claim otherwise available against the manufacturer of the vaccine could be brought against the United States as a substitute party defendant. *Hunt,* 636 F.2d at 592. The *Hunt* court viewed this situation as materially different from that which would be presented if the servicemen alleged they had been injured by *fellow members of the armed services.* If the alleged tort had been committed by a fellow serviceman, the *Feres* doctrine *would* bar suit against the United States. *Id.* at 595 n. 40, 596 n. 42.

Government from liability simply because the United States was the defendant, and accordingly held that the doctrine was no bar to governmental liability.[9] *Id.* at 597-600.

We also conclude, employing this analysis, that the *Feres* doctrine does not bar plaintiff's FTCA claim. This much-maligned doctrine, as we have seen, is best explained by the desire to avoid civilian court inquiry into matters that the Supreme Court views as best left beyond the pale of judicial scrutiny. This desire is understandable, given the fact that "the military is, of necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974). Recognizing the uniqueness of the military, the Supreme Court has consistently been chary of countenancing civilian court litigation brought by servicemen against fellow soldiers or superior officers. For example, the court recently reasoned that "the need for unhesitating and decisive action by military officers and equally disciplined

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[9] The *Hunt* court's reasoning was recently echoed by the Ninth Circuit in *Brown v. United States*, 715 F.2d 463 (9th Cir. 1983), another case involving a serviceman's suit against the Government for injuries allegedly resulting from mandatory swine flu inoculation. The court relied extensively on *Hunt* and its earlier decision in *Johnson*, 704 F.2d 1431, *see infra* note 6, to hold that the serviceman's suit was not barred by the *Feres* doctrine. The Fifth Circuit, in *Scales* v. *United States*, 685 F.2d 970, 971 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1772, 76 L.Ed.2d 344 (1983), held that the *Feres* doctrine barred an infant's FTCA suit alleging that he was born with congenital rubella syndrome as a result of negligent medical treatment his mother received while on active duty in the Air Force. It reached this result, however, by utilizing the same analysis that the *Hunt* and *Brown*, 715 F.2d 463, courts utilized. *See Scales*, 685 F.2d at 973 ("*Stencel* and its progeny direct our inquiry to the manner in which the policies underlying *Feres* are affected—specifically the impact on military discipline—rather than to the status of the claimant.").

responses by enlisted personnel," *Chappell*, 103 S.Ct. at 2367, militated against exposing officers sued by their subordinates to a *Bivens* remedy. *Id.* In *Stencel*, the court disallowed third-party indemnity claims against the United States arising out of service-connected injuries to soldiers, in part because "[t]he trial[s] would . . . involve second-guessing military orders, and would often require members of the Armed Service to testify in court as to each other's decisions and actions." *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2059. Similarly, the *Brown* court expressed its concern over the effect intramilitary litigation might have on discipline, particularly when the suit involved "negligent orders given or negligent acts committed in the course of military duty." *Brown*, 348 U.S. at 112, 75 S.Ct. at 143. The common thread running through these cases is the reluctance to upset, via the civilian forum, the delicate relationships which must exist for the military system to properly function.

With these principles in mind, we have little difficulty concluding that the *Feres* doctrine does not bar plaintiff's FTCA suit. The complaint in this case alleges that plaintiff's decedent was killed because civilian FAA air traffic controllers negligently guided the helicopter he was piloting into a mountain. There is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial.[10] Nor is

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[10] Although we have no cause to doubt that the FAA could have been placed under the direct control of the armed forces, the fact remains that Congress chose to make the FAA a civilian administration within the Department of Transportation. *See* Act of Jan. 12, 1983, Pub.L. No. 97-449, 1982 U.S. Code Cong. & Ad. News (96 Stat. 2413) (2416) (to be codified at 49 U.S.C. § 106(a)) (revising without substantive change 49 U.S.C. § 1341(a)). It bears mentioning that the Administrator of the FAA *must* be a civilian, and if the Administrator is a former regular officer of an armed service, the Deputy Administrator may not be an officer on active duty in an armed service, a

there a suggesion that examining the conduct of a civilian would in any way implicate the military services. Since the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military disciplinary structure, the prosecution of plaintiff's claim will not encroach upon the rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine." *Hunt*, 636 F.2d at 599. We therefore are unable to discern any sound reason for barring plaintiff's suit under the *Feres* doctrine.[11]

We acknowledge that the Ninth Circuit, in a case strikingly similar to this one, has reached the opposite conclusion. In *Uptegrove v. United States*, 600 F.2d 1248 (9th Cir.1979), *cert. denied*, 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980), a Navy lieutenant flying home on leave as a military space available passenger aboard an Air Force C-141 transport was killed when it crashed into a mountain. His wife brought a negligence action against the United States and three FAA air traffic controllers. The Ninth Circuit, concluding that the lieutenant was killed while engaging in activity incident to service, held that the *Feres* doctrine barred the suit. The court reasoned

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retired regular officer in an armed service, or a former regular officer in an armed service. Act of Jan. 12, 1983, Pub.L. No. 97-449, 1982 U.S. Code Cong. & Ad. News (96 Stat. 2413) (2416) (to be codified at 49 U.S.C. § 106(c) & (d)) (revising without substantive change 49 U.S.C. §§ 1341(b), 1342(b), and 1652(c)(2)).

[11] As we have seen, the military discipline rationale for the *Feres* doctrine, first offered by the Supreme Court in *Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139, has come to be viewed as the doctrine's "best explanation." *See Chappell*, 103 S.Ct. at 2365; *Muniz*, 374 U.S. at 162, 83 S.CT. at 1857. We have not discovered any Supreme Court case decided since the *Brown* court's amplification of the *Feres* decision suggesting that we should extend the doctrine to bar a suit which cannot conceivably impinge on the military disciplinary structure.

that the Supreme Court has never indicated that the *Feres* doctrine applies only to situations involving a threat to military dicipline, *Uptegrove*, 600 F.2d at 1250 (citing *United States v. Lee*, 400 F.2d 558, 564 (9th Cir.1968), *cert. denied*, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969)), and the focus in a *Feres* doctrine case should be solely on the serviceman's military status, not the status of the tortfeasor. *Uptegrove*, 600 F.2d at 1251 (citing *Lee*, 400 F.2d at 562).

With all due respect to the Ninth Circuit, it is our view that *Uptegrove* was wrongly decided. As an initial matter, the court accorded no weight at all to the fundamental fact that in *Stencel, Brown, Feres*, and *Brooks*, the relevant Supreme Court benchmarks antedating the *Uptegrove* decision, the alleged tortfeasor was a serviceman or an employee of the military, not an employee of a civilian branch of the Government performing a civilian task. Ignoring this distinction and blindly applying a rule to a factual scenario materially different from that which spawned the rule itself "has the virtue of easy application, [but is not] the better jurisprudential course." *Brown*, 739 F.2d at 366 (quoting *Miller v. United States*, 643 F.2d 481, 493 (8th Cir.1981) (en banc)). Moreover, the Ninth Circuit's statement that a threat to military discipline need not be present for *Feres* to apply reveals a misunderstanding of the third rationale for the *Feres* doctrine.[12] By definition, whenever the lawsuit is based on injuries incurred incident to service, and the *Feres* factual paradigm is present, the "military discipline" rationale *is* implicated because the Supreme Court "has found it unseemly to have military personnel, injured incident to service, asserting

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[12] We also doubt that the Ninth Circuit, if faced with the *Uptegrove* fact pattern today, would be so rigid in its analysis. *See supra* notes 6 & 9 for a discussion of *Johnson*, 704 F.2d 1431, and *Brown*, 715 F.2d 463, recent Ninth Circuit cases which emphasized the military discipline rationale for the *Feres* doctrine.

claims that question the propriety of decisions or conduct by fellow members of the military." *Hunt*, 636 F.2d at 599. Additionally, in the post-*Brown* Supreme Court cases where the *Feres* doctrine was consulted for guidance, the doctrine's third rationale figured prominently in the court's decisions. *See Chappell*, 103 S.Ct. at 2365, 2367; *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2058; *Muniz*, 374 U.S. at 162-63, 83 S.Ct. at 1857-58. Finally, while the Ninth Circuit's position that the status of the tortfeasor need not be examined may be defensible when the *Feres* factual paradigm is present, it is not as defensible when the facts permit the court to decide whether to imply an exception to the FTCA. *Cf. Feres*, 340 U.S. at 142, 71 S.Ct. at 157 (Court, when discussing analogous private liability, cautioned against "ignor[ing] the status of both the wronged and the wrongdoer").

CONCLUSION

Despite the barrage of criticisms leveled at the *Feres* doctrine and its theoretical predicates over the years, the fact remains that it still is the law.[13] We accordingly must adhere to it until instructed to do otherwise by the Supreme Court or Congress. That does not mean, however, that we should blindly hand to the Government judicially-created immunity from suit in a factual situation not present in, nor contemplated by, the *Feres* decision. Having determined that the principal *raison d'etre* of the *Feres* doctrine will not be implicated by allowing plaintiff to pursue her claim against the Government, we decline to extend the doctrine to bar her suit. Therefore, the fact that

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[13] It should be noted that the Supreme Court recently accepted an invitation to revisit the *Feres* doctrine. See *Shearer* v. *United States*, 723 F.2d 1102 (3d Cir. 1983), cert. granted, ____ U.S. ____, 105 S.Ct. 321, 83 L.Ed.2d 259 (1984).

serviceman Johnson was killed while on a Coast Guard mission is simply not controlling. We are mindful of an observation made by the Supreme Court in a related context: "There is no justification for this court to read exemptions into the [FTCA] beyond those provided by Congress. If the [FTCA] is to be altered that is a function for the same body that adopted it." *Muniz*, 374 U.S. at 166, 83 S.Ct. at 1859 (quoting *Rayonier*, 352 U.S. at 320, 77 S.Ct. at 377).

The judgment of the district court is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5764
D.C. Docket No. 82-06748

FRIEDA JOYCE JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF HORTON WINFIELD JOHNSON, FOR HERSELF AND FOR THE BENEFIT OF KEVIN LEE NIX, CYNTHIA ANN JOHNSON AND TAMARA JOYCE NIX, PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

JUDGMENT ON REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

This cause came on to be heard on rehearing en banc, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED;

It is further ordered that defendant-appellee pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

JOHNSON, Circuit Judge, dissented and filed an opinion, in which RONEY, TJOFLAT and HILL, Circuit Judges join.

Entered: January 13, 1986

For the Court: Spencer D. Mercer, Clerk

By: /s/WARREN A. GODFREY

Deputy Clerk

ISSUED AS MANDATE: Feb. 5, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 82-6748-CIV-JAG

FRIEDA JOYCE JOHNSON, ETC., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

[Filed: Oct. 26, 1983]

ORDER

THIS CAUSE has come before the Court for review upon the Plaintiffs' Motion for Rehearing which was granted by this Court on June 15, 1983. Upon consideration of the Plaintiffs' Memorandum in Support of Rehearing filed June 5, 1983 and Plaintiffs' Notice of Supplemental Authority filed September 19, 1983, it is

ORDERED AND ADJUDGED that upon reconsideration and rehearing of this cause, it is hereby ordered that

(1) The prior order of this Court of April 4, 1983 dismissing this case with prejudice is hereby ratified and confirmed.

(2) This cause is hereby DISMISSED with prejudice pursuant to the authority of *Feres* v. *United States*, 340 U.S. 135 (1950).

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 20th day of October, 1983.

/s/ JOSE A. GONZALEZ, JR.
United States District Judge

U.S. GOVERNMENT PRINTING OFFICE: 1986 – 491-507/20242

Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HORTON JOHNSON, DECEASED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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15pp

QUESTION PRESENTED FOR REVIEW

In framing the question presented for review here, the Government asserts that Mr. Johnson was killed "during a military mission" by the negligence of an air traffic controller who "participated in the military mission". Those are not exactly the facts in this case. The Eleventh Circuit's opinions carefully explain that Mr. Johnson was killed while searching for a civilian boat in distress by the negligence of a civilian controller providing routine air traffic control service. We therefore feel constrained to restate the question presented here neutrally, as follows:

Whether the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), bars a wrongful death action brought under the Federal Tort Claims Act on behalf of the survivors of a military serviceman killed by the negligence of a civilian employee of the Federal Aviation Administration, a civilian agency of the Government.

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No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HORTON JOHNSON, DECEASED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Frieda Joyce Johnson, individually and as administratrix of the estate of Horton Johnson, deceased, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's en banc decision in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

We cannot deny that there is a conflict among the circuits concerning the applicability of the *Feres* doctrine to cases like this one. The conflict is clearly stale, how-

ever, and has been effectively resolved by this Court's recent decision in *United States v. Shearer*, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985). That was the conclusion of the 8-4 majority of the en banc Court below, of course—and we are frankly puzzled by the Government's failure to confront the plain language of *Shearer*, upon which the majority squarely relied below, anywhere in the text of its petition for certiorari. Perhaps there was simply no rejoinder available to the Government except to reargue the outdated interpretation of *Feres* now clearly rejected by *Shearer*.

At issue here is the outer boundary of the reach of the much-maligned *Feres* doctrine, an issue which has a long and tortured history in this Court and the lower courts. That history has been carefully traced in the thoughtful opinion filed by the panel (and adopted by the majority), below, so we will not belabor it. Instead, in the interest of brevity, we will reduce it to its barest essentials. The history begins when this Court initially articulated several "rationales" for its creation of the *Feres* doctrine. Because some of those reasons (like the "distinctively federal character of the relationship", and the availability of VA benefits) existed in every suit brought by a serviceman against the Government under the Federal Tort Claims Act, lower courts began applying a "bright line rule"—erecting the *Feres* bar automatically whenever the plaintiff occupied the "status" of "active duty serviceman". It is these earlier, purely "status-related" decisions upon which the Government relies for conflict here.

When applied, of course, the *Feres* doctrine is (in effect) a license for tortious conduct and a mandate of second-class citizenship for servicemen. It therefore did not sit lightly with the lower courts or the commentators.

Neither did this Court treat it lightly, and over the course of the years that followed, it refined the foundations of the doctrine, announcing that the doctrine "seems best explained" by only one of the initially articulated rationales—what has now become known as the "military discipline rationale". *United States v. Brown*, 348 U.S. 110, 112 (1954); *United States v. Muniz*, 374 U.S. 150, 162 (1963); *Chappell v. Wallace*, 462 U.S. 296, 299 (1983).

With that lead, the lower courts began looking beyond the purely "status-related" test of the earlier decisions to the reasons underlying the *Feres* doctrine, and (as the panel's opinion explains in detail) began declining to erect the *Feres* bar when the primary rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine" was not implicated by the facts of the particular case. *Hunt v. United States*, 636 F.2d 580, 599 (D.C. Cir. 1980). This, in our judgment, was perfectly defensible—since a judicially created exception to an Act of Congress, amounting to a license for tortious conduct and a mandate of second-class citizenship, should clearly be applied sparingly, only when necessary, only when its legitimate purpose and primary reason are served. It was against this historical background that the issue presented here was presented to the Eleventh Circuit below.

After a thorough and thoughtful analysis of the problem, the panel concluded that the primary reason for the *Feres* doctrine was its "military discipline rationale"; that the remaining rationales initially advanced in support of the doctrine had not survived the scrutiny of time, and by themselves provided insufficient reasons for imposition of the *Feres* bar; that the plaintiff's suit did not implicate the primary rationale of the doctrine; and that the plaintiff should therefore not be deprived by the judiciary of the remedy expressly given her by Congress:

> With these principles in mind, we have little difficulty concluding that the *Feres* doctrine does not bar plaintiff's FTCA suit. The complaint in this case alleges that plaintiff's decedent was killed because civilian FAA air traffic controllers negligently guided the helicopter he was piloting into a mountain. There is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial. Nor is there a suggestion that examining the conduct of a civilian would in any way implicate the military services. Since the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military disciplinary structure, the prosecution of plaintiff's claim will not encroach upon the rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine." *Hunt*, 636 F.2d at 599. We therefore are unable to discern any sound reason for barring plaintiff's suit under the *Feres* doctrine.

Johnson v. United States, 749 F.2d 1530, 1539 (11th Cir. 1985), *approved on reh'g en banc*, 779 F.2d 1492 (11th Cir. 1986). The concluding footnote of the panel's opinion observes that "the Supreme Court recently accepted an invitation to revisit the *Feres* doctrine. *See Shearer v. United States*, 723 F.2d 1102 (3d Cir. 1983), *cert. granted*, ... U.S. ....., 105 S. Ct. 321, 83 L. Ed.2d 259 (1984)". 749 F.2d at 1540 n.13.

In our judgment, the panel's analysis of the scope of the *Feres* doctrine was fully vindicated by this Court's subsequent decision in *Shearer*. In that case, this Court reiterated that "*Feres* seems best explained" by the mil-

itary discipline rationale, and it observed that the other rationales advanced in the past as support for the *Feres* doctrine were "no longer controlling". *Shearer,* 87 L. Ed.2d at 44, 44 n.4. It also squarely rejected the position advanced by the Government here—that application of the *Feres* bar depends exclusively upon the "status" of the plaintiff as active-duty serviceman, rather than the extent to which the facts implicate the reason for the doctrine—noting that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules" . . . and that the *Feres* bar should be erected only when "the suit requires the civilian court to second-guess military decisions . . . and . . . the suit might impair essential military discipline". *Id.* We cannot read this Court's mind, of course, but we think it not improbable that the *Shearer* opinion was drafted with the instant case clearly in mind. At the very least, *Shearer* implicitly approves everything said in the panel's opinion in this case.

In any event, that is the way the 8-4 majority of the en banc Court read *Shearer* below:

> Following this command [of *Shearer*], we find that the panel opinion has given proper consideration to the *Feres* factors with particular attention to whether or not the claims asserted here will implicate civilian courts in conflicts involving the military structure or military decisions. The claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration (a civilian administration within the Department of Transportation) who were not in any way involved in military activities. The fact that the decedent was a helicopter pilot for the United States Coast Guard is not sufficient, standing alone, to activate the *Feres* preclusion.

Johnson v. United States, 779 F.2d 1492, 1494 (11th Cir. 1986) (en banc). If *Shearer* is still the law in this Court, the instant case was clearly decided correctly—and there is no need for this Court to grant certiorari simply to reannounce what it has already announced in *Shearer*. The conflicts have been effectively resolved by *Shearer*, and will therefore take care of themselves. At the very least, the issue presented here deserves further exploration by the lower courts in light of *Shearer*, so that this Court has the benefit of a thorough analysis of the issue upon its new foundation before resolving it with finality.

In addition to asserting conflict with the now thoroughly discredited, purely "status-related" progeny of *Feres*, the Government argues that this case was decided incorrectly because Mrs. Johnson received limited VA benefits (a fact which is not in the record), and because trial of the case *will* impact the "military discipline rationale" of *Feres*. In view of the fact that this Court announced in *Shearer* that the "VA benefits rationale" of *Feres* is "no longer controlling", our response to the first argument can be exceedingly brief. We note simply that this Court has never held that the receipt of VA benefits, by itself, is sufficient to activate the *Feres* bar, and it has refused to erect the bar where VA benefits were received but the other factors of *Feres* were absent—holding instead simply that benefits received were to be offset against a recovery in the FTCA action. *Brooks v. United States*, 337 U.S. 49 (1949); *United States v. Brown*, 348 U.S. 110 (1954). *See Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983).

There is a dictum (and it is indisputably a dictum) in *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980), to the effect that VA benefits are the "exclu-

sive" and "sole remedy" available to servicemen, but the lower courts have consistently read this dictum to mean that receipt of VA benefits becomes a serviceman's "sole remedy" only *because* (and when) the *Feres* doctrine otherwise bars an FTCA action, not that an FTCA action is barred *because of* the receipt of VA benefits. *See, e.g., Cole v. United States,* 755 F.2d 873 (11th Cir. 1985); *Stanley v. United States,* 786 F.2d 1490 (11th Cir. 1986); *Parker v. United States,* 611 F.2d 1007 (5th Cir. 1980). After *Shearer,* of course, there can no longer be any doubt as to the correctness of this reading of the *Hatzlachh* dictum—and, once again, there is simply no need for this Court to grant certiorari in this case to reannounce what it just announced in *Shearer.*

The Government has also insisted that the instant case was wrongly decided because the facts squarely implicate the "military discipline rationale" of *Feres.* The 8-4 majority of the Court below expressly found to the contrary, of course—and not even the dissenting judges (who relied exclusively on the now discredited "status-related" progeny of *Feres*) concluded to the contrary. Although this 12-0 vote on this argument should probably be dispositive of its propriety here, we feel constrained to respond to it briefly because the facts upon which it depends have simply been invented from whole cloth.

The very most that the record in this case presently reflects is that Mr. Johnson requested routine air traffic control service, by radio request to a conventional Air Route Traffic Control Center, when his helicopter encountered instrument flight conditions, as any pilot—civilian, military, foreign, or otherwise—was required to do by federal regulation. No contention has been made that the Coast Guard was negligent in launching the

rescue mission at issue in this case, or negligent in any other way. Neither has any contention been made that the weather conditions were so bad that non-military air traffic could not operate in them. Neither has any contention been made that Mr. Johnson's mission was any more dangerous than flight under instrument conditions by a civilian aircraft. Neither has any contention been made that Mr. Johnson was involved in any of the types of "Special Military Operations" described in the Department of Transportation manual which the Government has added to the record here.

Neither has the Government alleged contributory negligence on the part of Mr. Johnson at this stage of the proceedings. But even assuming that this issue might ultimately surface in the litigation, there will still be only two very narrow factual issues to be decided—whether, after the plaintiff's decedent submitted his helicopter to the positive control of the Government's air traffic controllers, appropriate directions concerning altitude and heading were given to him, and whether he piloted his helicopter properly in light of those directions. Those questions will not implicate anything even remotely "military"—and their answers will depend solely upon federal air traffic control regulations promulgated by the FAA, which apply equally to civilian and military aircraft alike.[1]

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1. 49 U.S.C. §1348(c) directs the Secretary of Transportation "to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, . . . and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision . . .". 49 U.S.C. §1348(f) makes it perfectly clear that all military aircraft are required to comply with the regulations directed by subsection (c), except in the following narrow circumstances:

(Continued on following page)

In short, the litigation of this case will be no different in any respect than it would have been if the plaintiff's decedent had been employed by United Airlines.

Suits by the survivors of commercial airline pilots against the FAA for the negligence of air traffic controllers have never been barred by the *Feres* doctrine, notwithstanding the clearly symbiotic relationship of the FAA and the commercial airline industry, because a suit against the Government for the negligence of the FAA does not charge anyone in the military with misfeasance; it does not bring the actions of military servicemen under judicial scrutiny; and it poses no threat to the military disciplinary structure whatsoever. *See, e.g., Daley v. United States,* ..... F.2d ..... (11th Cir. 1986) (case no. 85-3445; slip opinion filed July 3, 1986). If an FTCA action is not inappropriate in that circumstance, it is not inappropriate in this case merely because Mr. Johnson happened to be wearing a uniform when he requested routine civilian air traffic control service. The instant case is no different than the case in which a serviceman

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Footnote continued—

> When it is essential to the defense of the United States because of a military emergency or urgent military necessity, and when appropriate military authority so determines, and when prior notice thereof is given to the Secretary of Transportation, such military authority may authorize deviation by military aircraft of the national defense forces of the United States from air traffic rules issued pursuant to this subchapter. Such prior notice shall be given to the Secretary of Transportation at the earliest time practicable and, to the extent time and circumstances permit, every reasonable effort shall be made to consult fully with the Secretary of Transportation and to arrange in advance for the required deviation from the rules on a mutually acceptable basis.

We assure the Court that this exception will never be implicated on the facts in the instant case, and that this is a straightforward case governed by air traffic rules promulgated by the FAA which apply equally to all pilots operating in the national air space.

is struck by an errant bullet negligently fired by an FBI agent into the crowd at an Army-Navy game, or the case in which a serviceman is run over by a truck operated by a lawyer employed by the Department of Justice. The *reason* for the *Feres* doctrine is simply not implicated here, so the *Feres* doctrine is not implicated either.

Unless this Court is anxious to recede from *Shearer* before its ink has scarcely dried, or to license the tortious conduct of civilian employees of the Government and mandate second-class citizenship for servicemen *merely* because they are servicemen, we respectfully submit that the Eleventh Circuit appropriately heeded this Court's unmistakably clear signal in *Shearer;* that its thorough en banc analysis of this case resulted in a correct conclusion; and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 85-2039

Supreme Court, U.S.
FILED
SEP 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF HORTON JOHNSON, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF HORTON JOHNSON, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In our petition, we demonstrated that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars actions brought under the Federal Tort Claims Act (FTCA) on behalf of service members injured incident to military service by the alleged negligence of civilian employees of the United States, and that the court of appeals' contrary conclusion is flatly inconsistent with the decisions of all of the other courts of appeals that have considered the issue. Respondent concedes (Br. in Opp. 1) that there is a conflict in the circuits on the issue. Notwithstanding this acknowledged conflict, respondent asserts that review by this Court is unwarranted because the conflict has been effectively resolved by this Court's decision in *United States* v. *Shearer*, No. 84-194 (June 27, 1985). Respondent's contention is based on a misreading of *Shearer*.

In *Shearer*, a soldier, while away from his base and off-duty, was murdered by a fellow soldier. The survivor of the soldier sought damages under the FTCA claiming that Army officials were negligent in failing to prevent the murder. Slip op. 1-2. The Court unanimously held that the action was barred by the *Feres* doctrine.

Respondent's repeated assertions (Br. in Opp. 2, 5) that *Shearer* somehow resolved the issue presented in this case in her favor is entirely without merit. The Court in *Shearer* was faced with a claim of negligence by Army officials and thus had no occasion to address whether the *Feres* doctrine may be evaded by alleging civilian negligence. Moreover, respondent's claim (Br. in Opp. 5) that the Court in *Shearer* implicitly rejected the arguments pressed by the government in this case overlooks the fact that the Court in *Shearer* reaffirmed the holding in *Feres* "that a soldier may not recover under the Federal Tort Claims Act for injuries which 'arise out of or are in the course of activity incident to service.' " *Shearer*, slip op. 4-5, quoting *Feres*, 340 U.S. at 146. The ruling in *Shearer* thus in no way calls into question the decisions of five circuits (Pet. 6-7) that service members injured incident to military service on account of the negligence of civilian government employees may not pursue FTCA actions.[1]

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[1]The Eleventh Circuit recently extended its decision in this case in *Stanley* v. *United States*, 786 F.2d 1490 (1986), where the court, citing its decision here, held that the *Feres* doctrine did not bar a serviceman from bringing an FTCA claim based on negligence on the part of his superior officers. The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Stanley* (we will furnish a copy of our petition to counsel for respondent). The Eleventh Circuit's extension of its erroneous decision in this case provides another reason why the Court should grant review here.

Respondent notes (Br. in Opp. 4-5) that the Court in *Shearer* emphasized that the *Feres* doctrine is best explained by the fact that allowing FTCA actions seeking recovery for injuries incurred incident to military service to go forward "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer*, slip op. 7. In this respect, the Court in *Shearer* broke no new ground, reaffirming what the Court had made clear more than twenty years before—that "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligents acts committed in the course of military duty.' " *United States* v. *Muniz*, 374 U.S. 150, 162 (1963), quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954). See also *Chappell* v. *Wallace*, 462 U.S. 296, 299-300 (1983). All but one of the nine cases cited in our petition (at 6-7) as conflicting with the court of appeals' decision here were decided after the Court in *Muniz* stated that the *Feres* doctrine is best explained by factors relating to military discipline and effectiveness. It is therefore manifest that the Court's reaffirmation of that statement in *Shearer* in no way casts doubt on the rulings of those courts that have held that the *Feres* doctrine applies in cases alleging negligence on the part of civilian government employees working with the military.

Respondent also asserts (Br. in Opp. 5) that the Court in *Shearer*, in eschewing "bright-line rules" (*Shearer*, slip op. 5), implicitly rejected our claim that Lieutenant Johnson's status as an active-duty serviceman injured incident to service bars an FTCA action. Respondent's discussion of this aspect of the *Shearer* opinion is misleading. In rejecting the use of bright-line rules, the Court was agreeing with the government that the military command structure would be

damaged by permitting the suit to go forward even though the soldier was off-duty and not on a military base when he was murdered, factors that have often led courts to conclude that an injury was not incurred incident to military service. Cf. *Brooks* v. *United States*, 337 U.S. 49, 50 (1949). The Court's conclusion that military discipline and effectiveness can be undermined by FTCA suits even when soldiers are injured while off-duty and off-base does not suggest that a service member injured while on a military mission may go forward with an FTCA claim.

Finally, respondent cannot avoid the application of the *Feres* doctrine by asking the Court to ignore the obvious military nature of Lieutenant Commander Johnson's accident and by characterizing the claim as one involving "routine air traffic control service" (Br. in Opp. 7) that is "no different in any respect than it would have been if [respondent's] decedent had been employed by United Airlines" (*id.* at 9). It is undisputed that Lieutenant Commander Johnson died in the course of performing a rescue operation as a member of the United States Coast Guard, and that air traffic controllers employed by the Federal Aviation Administration were participating in this rescue operation by providing radar assistance. See Pet. App. 12a. The facts underlying respondent's FTCA action thus bear little resemblance to a commercial flight by United Airlines. United Airlines is not "a military service and branch of the armed forces of the United States" (14 U.S.C. 1), and pilots employed by United Airlines are not responsible for operating "rescue facilities for promotion of safety on, under, and over the high seas * * * of the United States." 14 U.S.C. 2. Plainly, the rescue operation underlying respondent's FTCA action

(with its attendant dangers) is "without counterpart in civilian [aviation]." *Chappell*, 462 U.S. at 300, quoting *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975).[2]

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

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[2]Respondent's attempt to have the Court overlook the military context of her FTCA claim is inconsistent with the decision in *Shearer*. In *Shearer* the plaintiff argued that her FTCA action did not involve military affairs but rather "a 'straightforward personnel decision' " (*Shearer*, slip op. 6, quoting Tr. of Oral Arg. 37). The Court squarely rejected this attempt to overlook the military context of the case. See *ibid.* The Court in *Feres* rejected a similar suggestion. There, in cases involving claims of negligence by military physicians, the Court recognized that medical care during military service was in no way comparable to "the usual civilian doctor and patient relationship * * *." *Feres*, 340 U.S. at 142.

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars an action under the Federal Tort Claims Act brought on behalf of a serviceman killed incident to military service where the complaint alleges the negligence of civilian employees of the federal government.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. 1a-10a) is reported at 779 F.2d 1492. The panel opinion of the court of appeals (Pet. App. 11a-34a) is reported at 749 F.2d 1530. The district court's order (Pet. App. 35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1986. On April 3, 1986, Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 12, 1986. The petition for a writ of certiorari was filed on June 11, 1986, and was granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671 *et seq.*], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. Lieutenant Commander Horton Johnson was a helicopter pilot in the United States Coast Guard, "a branch of the armed forces of the United States" (14 U.S.C. 1; see also 10 U.S.C. 101(4)) responsible for operating "rescue facilities for the promotion of safety on, under, and over the high seas * * * of the United States" (14 U.S.C. 2). In the early morning hours of January 7, 1982, Lieutenant Commander Johnson's Coast Guard station in Hawaii received a distress call from a boat lost in a storm. Lieutenant Commander Johnson and several other members of the Coast Guard responded to the call for assistance; he piloted a helicopter to the area from which the distress call had been received. Visibility during the storm was quite poor, and while searching for the boat Lieutenant Commander Johnson requested radar assistance from Federal Aviation Administration (FAA) air traffic controllers. The FAA air traffic controllers pro-

vided air traffic control services to Lieutenant Commander Johnson's helicopter, but it crashed into a mountain and all on board died. Pet. App. 12a.

Respondent, Lieutenant Commander Johnson's widow and the administratrix of his estate, applied for and received the full range of veterans' benefits payable as a result of Lieutenant Commander Johnson's death.[1] In addition, respondent brought this action in the United States District Court for the Southern District of Florida under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, seeking damages from the United States. Respondent did not allege that Lieutenant Commander Johnson's fellow service members or superior officers acted negligently. Instead, respondent claimed that the air traffic controllers negligently guided Lieutenant Commander Johnson's helicopter. The district court dismissed the complaint because the injury to Lieutenant Commander Johnson arose out of activity incident to military service and therefore is barred by *Feres* v. *United States*, 340 U.S. 135 (1950) (Pet. App. 35a).

2. The court of appeals reversed. The court did not dispute that Lieutenant Commander Johnson's death occurred incident to service. And in cases involving the "typical *Feres* factual paradigm" the court concluded that "the issue is whether the injury arose out of or during the course of an activity incident to service" (Pet. App. 25a). But the court concluded that this was not a typical *Feres* case because "the alleged tortfeasor is not a member of the armed forces or a civilian employee engaged in activities usually associated with the armed forces" (*ibid.*).

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[1] The Coast Guard advises us that respondent has received $35,690.66 in life insurance, a $3,000 death gratuity, and presently receives approximately $868 per month in dependency and compensatory benefits.

Because the alleged tortfeasor was a civilian, the court concluded that an analysis of the facts of this case was warranted to determine whether allowing respondent's claim to go forward would undermine the purposes of the *Feres* doctrine (*ibid.*).

The court concluded, after review of this Court's *Feres* doctrine cases, that "[t]his much-maligned doctrine" (Pet. App. 27a) is based primarily upon "the reluctance to upset, via the civilian forum, the delicate relationships which must exist for the military system to properly function" (*id.* at 28a). The court concluded that "[t]here is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial" (*ibid.*). Because, in the court's view, "the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military disciplinary structure" (*id.* at 29a), the court held that respondent's suit is not barred by the *Feres* doctrine.

3. The court of appeals granted the government's suggestion for rehearing en banc, but on rehearing reinstated the panel's opinion (Pet. App. 2a-5a). Like the panel, the en banc court reasoned that the "claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration * * * who were not in any way involved in military activities" (*id.* at 5a) so that, in the court of appeals' view, a trial here would not require civilian courts to second-guess military decisions.

Judge Johnson, joined by Judges Tjoflat, Roney, and Hill, dissented. They would have affirmed the dismissal of the complaint on the basis that the injury to Lieutenant Commander Johnson arose out of activity incident to military service and therefore was barred by *Feres*. The majority's contrary result, Judge Johnson noted, directly conflicted with the decisions of numerous other courts of

appeals which have uniformly applied *Feres* to bar actions by service members based on the alleged negligence of civilian employees of the federal government (Pet. App. 7a-8a). Judge Johnson also relied directly on this Court's *Feres* doctrine cases, since the Court has never limited the application of *Feres* to military tortfeasors. Rather, Judge Johnson noted this Court's statement in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 669 (1977), that *Feres* barred recovery by an on-duty serviceman injured due to the negligence of "Government officials" (Pet. App. 10a). Since the FTCA is only relevant to alleged torts by government employees, Judge Johnson reasoned that the only inquiry in this case is "whether or not [the] serviceman's injury was incident to service" (*ibid.*). He concluded that Lieutenant Commander Johnson's death necessarily was incident to service, since it occurred "in the course of duty on a regular Coast Guard mission" (*ibid.*).

SUMMARY OF ARGUMENT

Shortly after the Federal Tort Claims Act was enacted, this Court determined in *Feres* v. *United States,* 340 U.S. 135, 146 (1950), that the Act did not waive the sovereign immunity of the United States for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." In reaching that conclusion and in reiterating the holding of *Feres* in later cases, the Court has consistently stressed that service members injured incident to service cannot recover from the federal government on account of the negligence not only of other service members but of *federal employees* in general. The courts of appeals have consistently held, until this case, that the *Feres* doctrine bars recovery from the federal government on behalf of a service member injured inci-

dent to service, whether the service member was injured as a result of negiligence by another service member or by a civilian employee.

This Court has stated that the primary basis for the *Feres* doctrine is that it bars suits that "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 7). As the courts of appeals other than the court below have recognized, the conduct of military affairs inevitably involves cooperation between civilian employees of the federal government and military personnel. Trials in cases involving allegations that negligence on the part of civilians working with the military led to injury or death of a service member incident to service will undermine important relationships necessary to the conduct of military operations.

This case demonstrates the deleterious effects on military discipline and effectiveness that would result from permitting tort suits alleging negligence by civilian employees of the federal government. Civilian air traffic controllers, like those charged with negligence here, frequently work closely with the military, and such allegations disrupt the important relationship between the military and the FAA. Further, a trial in this case would almost certainly require military personnel to account for their decision to order Lieutenant Commander Johnson aloft and to evaluate the performance of the military personnel involved in the rescue operation. Thus, the court of appeals erred in concluding, under its case-by-case inquiry to determine whether the primary purpose underlying the *Feres* doctrine would be undermined by a trial in this case, that a trial here would not disrupt military discipline and effectiveness.

Moreover, the court of appeals erred in concluding that a case-by-case inquiry was appropriate. The test established by this Court in *Feres* and reiterated since—that a tort suit on behalf of a service member is barred where the injury occurred incident to service—appropriately defines the class of cases where dismissal is necessary to avoid interference by civilian courts with military affairs. Cases where injury occurred incident to service are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer,* slip op. 6-7 (emphasis in original)).

Furthermore, the other factors underlying the *Feres* doctrine indicate that suit should be barred whenever an injury occurs incident to service, whether allegedly caused by the negligence of a service member or a civilian employee. The Veterans' Benefits Act compensates service members injured incident to service and "provides an upper limit of liability for the Government as to service-connected injuries" (*Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666, 673 (1977)). The court of appeals' decision has the incongruous result of allowing compensation under both the Veterans Benefits Act and the FTCA if, but only if, the governmental negligence is committed by a civilian employee. Also, it is highly unlikely, given the distinctively federal relationship between the government and service members, that Congress intended for state law to govern claims by service members against the government whenever the injury was caused by civilian employees of the United States.

ARGUMENT

THE *FERES* DOCTRINE BARS FTCA ACTIONS BROUGHT ON BEHALF OF SERVICE MEMBERS INJURED INCIDENT TO MILITARY SERVICE WHERE THE COMPLAINT ALLEGES THE NEGLIGENCE OF CIVILIAN EMPLOYEES OF THE UNITED STATES

The Federal Tort Claims Act (FTCA) "waived sovereign immunity from suit for certain specified torts of federal

employees" (*Dalehite* v. *United States,* 346 U.S. 15, 17 (1953)). However, the Court has recognized repeatedly that "[t]he Act did not waive the sovereign immunity of the United States in all respects" (*United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 808 (1984)). See *Kosak* v. *United States,* 465 U.S. 848 (1984); *Dalehite,* 346 U.S. at 17. Shortly after the enactment of the FTCA, this Court held that "the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to [military] service" (*Feres* v. *United States,* 340 U.S. 135, 146 (1950)). In construing the FTCA to bar claims for injuries "incident to service," the Court noted that "if we misinterpret the Act, at least Congress possesses a ready remedy" (*Feres,* 340 U.S. at 138). On numerous occasions since *Feres* was decided, Congress has declined to amend the FTCA to allow service members to sue for injuries incident to service.[2] And only two terms ago this Court reaffirmed the holding in *Feres* that "a soldier may not recover under the Federal Tort Claims Act for injuries which 'arise out of or are in the course of activity incident to service' " (*United States* v. *Shearer,* No. 84-194 (June 27, 1985), slip op. 4-5, quoting *Feres,* 340 U.S. at 146).

There is no doubt that the death of Lieutenant Commander Johnson occurred incident to military service—specifically in the course of a rescue mission. If respondent's complaint had alleged negligence by fellow service members or superior officers, all agree that it would be barred by the *Feres* doctrine. This Court's cases, and the policies underlying *Feres*, compel the conclusion

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[2] For example, each of the two prior Congresses has considered but failed to enact legislation that would allow service members to bring medical malpractice suits. See H.R. 1161, 99th Cong., 1st Sess. (1985); H.R. 1942, 98th Cong., 1st Sess. (1983).

that the doctrine is not rendered inapplicable simply because negligence is alleged on the part of civilian rather than military employees of the United States.

A. Prior To This Case, The Courts Had Consistently Applied The *Feres* Doctrine To Bar Claims By Service Members Injured Incident To Service, Whether By Acts Of Civilian Or Military Employees Of The Federal Government

Although the plaintiffs in *Feres* were injured by other service members (see 340 U.S. at 138), the Court's opinion contained "no reference, except as a mere statement of fact, to the military status of the primary tort feasors, and certainly no reliance on that fact" (*Sheppard* v. *United States,* 294 F. Supp. 7, 8 (E.D. Pa. 1969)). Indeed, rather than limiting its ruling to the tortious acts of fellow service members, the Court in *Feres* ruled broadly that "[w]e know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers *or the Government he is serving*" (*Feres,* 340 U.S. at 141 (footnote omitted; emphasis added)).

Since *Feres,* the Court has "adhere[d] * * * to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty" (*United States* v. *Brown,* 348 U.S. 110, 113 (1954)). In *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977), the Court, in holding that a private contractor who paid damages to a serviceman may not sue the United States for indemnity, reaffirmed that "[i]n *Feres* v. *United States, supra,* the Court held that an on-duty serviceman who is injured *due to the negligence of Government officials* may not recover against the United States under the Federal Tort Claims Act" (431 U.S. at 669 (emphasis added)); see also *id.* at 673 (emphasis added) ("at issue would be the degree of fault, if any, on the part of the *Government's agents* and the effect upon the serviceman's safety"); *Dalehite* v. *United States,* 346 U.S. 15, 31 n.25 (1953) (emphasis added) (characterizing the three

cases decided *sub nom. Feres* v. *United States, supra,* as involving "injuries * * * allegedly caused by negligence of *employees of the United States*"). Thus, the crucial inquiry under this Court's cases has been whether the injury to the service member was "incident to service." See *United States* v. *Shearer,* No. 84-194 (June 27, 1985), slip op. 4-5, quoting *Feres,* 340 U.S. at 146; *Brown,* 348 U.S. at 113; *Feres,* 340 U.S. at 138; *Brooks* v. *United States,* 337 U.S. 49, 50, 53 (1949).

The Court's decision in *Brooks,* decided just a year before *Feres,* buttresses the conclusion that the applicability of *Feres* does not turn on whether the alleged negligence was committed by civilian or military employees of the federal government. In *Brooks* a serviceman was killed when his car was struck by a truck driven by a civilian employee of the United States (see 337 U.S. at 50). In holding that the serviceman could bring an FTCA action, the Court did not rely upon the civilian status of the tortfeasor employee. Instead, the Court focused on the fact that the injury occurred off-base, while the serviceman was on leave, and had no connection to the military—*i.e.*, that the injury was not "incident to * * * Brooks' service" (*id.* at 52). In subsequent decisions the Court has reaffirmed that the result in *Brooks* hinged not on the fact that the tortfeasor was a civilian employee of the government, but rather on the fact that the injury there was not incident to military service. See *Shearer,* slip op. 6; *Brown,* 348 U.S. at 111-113.[3]

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[3] See also *Hass ex rel. United States* v. *United States,* 518 F.2d 1138, 1141-1142 n.4 (4th Cir. 1975) (holding that the *Feres* doctrine applies where the tortfeasor is a civilian employee of the United States, and relying on the fact that "[i]n *Brooks* the Army truck that hit claimants' car was driven by a civilian, but the Supreme Court simply mentioned that fact in passing and placed no emphasis upon it in reaching a decision").

Except for the decision below, every court to address the question—including six other circuits—has held that the *Feres* doctrine bars FTCA actions by service members injured incident to service by the alleged negligence of civilian employees of the federal government. *Newell* v. *United States,* No. 86-1114 (3d Cir. Sept. 15, 1986) (opinion not for publication)[4]; *Warner* v. *United States*, 720 F.2d 837 (5th Cir. 1983); *Carter* v. *City of Cheyenne*, 649 F.2d 827 (10th Cir. 1981); *Uptegrove* v. *United States*, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044 (1980); *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980); *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (5th Cir. 1975); *United States* v. *Lee*, 400 F.2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969); *United Air Lines* v. *Wiener*, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964); *Layne* v. *United States*, 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962); *Watkins* v. *United States*, 462 F. Supp. 980 (S.D. Ga. 1977), aff'd, 587 F.2d 279 (5th Cir. 1979); *Gilardy* v. *United States*, No. 83-1277 (D. Hawaii June 13, 1984), appeal pending, No. 84-2269 (9th Cir.); *Sigler* v. *LeVan*, 485 F. Supp. 185 (D. Md. 1980); *Frazier* v. *United States*, 372 F. Supp. 208 (M.D. Fla. 1973); *Sheppard* v. *United States*, 294 F. Supp. 7 (E.D. Pa. 1969). In each of these cases the service member was injured in the course of activity incident to service by the alleged negligence of civilian employees of the federal government who did not work for the Department of Defense. In each case the court held that where the injury to the service member arises out of "activity incident to service" (*Feres*, 340 U.S. at 146), and is caused by the "negligence of Government officials" (*Stencel*, 431

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[4] Copies of this opinion have been lodged with the Clerk of the Court and sent to counsel for respondent.

U.S. at 669), the service member cannot recover "against * * * the Government he is serving" (*Feres*, 340 U.S. at 141).[5]

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[5] A number of other courts have applied the *Feres* doctrine where a service member bases a claim on the actions of civilian employees of the United States who, unlike FAA personnel, are employed by the Department of Defense or are in the military chain of command. See, *e.g.*, *Jaffee* v. *United States*, 663 F. 2d 1226, 1238 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982); *Hass ex rel. United States* v. *United States*, 518 F.2d 1138, 1141 (4th Cir. 1975). We do not understand the court of appeals to have disagreed with such decisions. According to the court, cases alleging negligence on the part of civilians employed by the Department of Defense or in the military chain of command would fall into what the court described as the "typical *Feres* factual paradigm," since that paradigm includes cases where the alleged tortfeasor is "a civilian employee engaged in activities usually associated with the armed forces" (Pet. App. 25a). In such cases, the court here stated, tort claims against the United States are barred as long as the injury was incurred incident to service, and no inquiry into whether the purposes underlying the *Feres* doctrine would be compromised by permitting the suit to go forward is warranted (*ibid.*).

However, the Eleventh Circuit recently held that an FTCA claim based on negligence on the part of both military personnel and civilians working with them was not barred. *Stanley* v. *United States*, 786 F.2d 1490 (1986), petition for cert. pending, No. 86-393 (we have sent a copy of our petition in *Stanley* to counsel for respondent). In *Stanley* the court concluded that the plaintiff could go forward with an FTCA claim alleging injury based on the negligence of his superior officers and civilians who participated in a chemical testing program conducted by the Army. The court in *Stanley* relied on the decision of the court in this case in concluding, contrary to the court's plain statement here (Pet. App. 25a), that an inquiry was warranted to determine whether the purposes underlying the *Feres* doctrine would be advanced by barring the particular suit (786 F. 2d at 1499). Therefore, it may be that case-by-case inquiries will now be conducted in all cases in the Eleventh Circuit involving the *Feres* doctrine unless the decision below is reversed.

B. Failure To Apply The *Feres* Doctrine Where Actions Of Civilian Employees Are At Issue Will Interfere With Military Discipline And Effectiveness

It is because of the varied and wide-ranging nature of military activity that the Court in *Feres* and *Stencel* spoke in terms of injuries incurred incident to military service rather than in terms of injuries caused by other service members, and that every court other than the court below has applied *Feres* to bar claims of civilian negligence. Courts have correctly recognized that "when military actions are taken or military operations carried out, the United States government acts as an entity, often relying upon and drawing from its civilian agencies for personnel, equipment, technological assistance, or intelligence reports" (*Newell*, slip op. 5). This Court has stated that the *Feres* doctrine is " 'best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty' " (*Shearer*, slip op. 5, quoting *United States* v. *Muniz*, 374 U.S. 150, 162 (1963)). The court of appeals' conclusion that a trial here would not interfere with military effectiveness or call for scrutiny of military decisions is wholly unrealistic. Cases involving allegations that negligence on the part of civilians working with the military led to injuries incurred incident to service are "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer,* slip op. 6-7 (emphasis in original)), as the facts of this case illustrate.

1. Military activities are not simply the actions of the armed forces. Rather, in all respects they represent actions taken by and on behalf of the United States of America

through all of its agents, and civilians frequently play a critical role in numerous military activities and operations. Civilians may, for example, prepare and maintain military equipment (see *Newell*, slip op. 5 (Maritime Administration maintained ship for use by the Navy)), assist in the design and production of weapons systems (see 42 U.S.C. 2034-2035 (Department of Energy cooperates with the armed forces in developing, manufacturing, and storing nuclear weapons)), provide necessary medical care (see *Certain Underwriters at Lloyd's*, 511 F.2d at 160 (Public Health Service employees worked with military physicians)), participate in intelligence activities with the military (see *Sigler*, 485 F. Supp. at 1919; Exec. Order 12333, §§ 1.11(d), 1.12, 3 C.F.R. 207-209 (1982) (CIA and FBI cooperate with armed services intelligence agencies)), or control military air traffic (see *Uptegrove* v. *United States, supra*). In these situations, "a civilian is analogous to a serviceman when he is performing functions for the benefit of the military" (*Hass ex rel. United States* v. *United States*, 518 F.2d 1138, 1142 n.4 (4th Cir. 1975)).

Given the extensive civilian involvement in activities incident to military service, the courts other than the court below have uniformly applied the *Feres* doctrine to claims alleging civilian negligence. Here, too, it is illogical to suggest that military effectiveness requires barring an action challenging the decisions of Lieutenant Commander Johnson's fellow service members who participated in this rescue mission, but permits an action against FAA personnel who were necessarily involved in military activities and worked with those military personnel.

2. The court of appeals' conclusion that this case will not interfere with military discipline and effectiveness (see Pet. App. 4a-5a, 28a-29a) is wrong.

a. FAA air traffic controllers frequently work closely with the armed services, as this case illustrates. In guiding Lieutenant Commander Johnson's helicopter, the air

traffic controllers were called upon to assist in a dangerous military operation. Indeed, civilian employees of the FAA frequently are called upon to participate in a wide range of important military operations. FAA air traffic controllers participate in war games and exercises and help to assure the defense of the nation by assisting the armed forces in the interception of unknown aircraft entering United States airspace. See FAA, U.S. Dep't of Transp., *Order 7610.4F: Special Military Operations* 36, 106, 123-124, 134 (Jan. 21, 1981) (*FAA Order 7610.4F*).[6] FAA air traffic controllers also work closely with the Strategic Air Command; they assist in the guidance of the United States aircraft equipped to fire nuclear weapons and the guidance of those aircraft which direct the firing of our land-based nuclear missiles (*id.* at 32). Air traffic at many military bases is directed by FAA controllers (*id.* at 29, 30), and even where military controllers are utilized civilian controllers are responsible for evaluation and review of military control facilities (*id.* at 19, 28).

Additionally, as liaison officers, FAA employees assist and advise various components of the military in the performance of their defense functions. FAA employees serve as advisers to the North American Aerospace Defense Command (NORAD) in "defending the North American continent against air attack" (*FAA Order 7610.4F* at 36). In this capacity FAA employees help NORAD develop plans for the security control of United States airspace, designate zones essential to the NORAD mission and regulate airspace in these zones, and provide air traffic controller surveillance and information (*id.* at 36-37). FAA employees assist the Air Force's Military Airlift Command in "conducting military airlift operations whenever * * * required in times of peace or war" (*id.* at 40). The FAA

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[6] A copy of this order has been lodged with the Clerk of the Court.

shares information and data with and advises the Navy on air traffic control as part of the Navy's efforts to ensure aviation safety (*id.* at 34). Thus, the FAA is involved in many of our nation's most important and sensitive military activities. As both the FAA and the armed services have concluded, "[t]he cooperation and active participation of the FAA is essential to the effective accomplishment of [these military] mission[s]" (*id.* at 40; see also *id.* at 1, 17, 34, 36).[7]

It follows that allowing suits by service members against FAA air traffic controllers would disrupt a working relationship which is crucial to the general defense and national security and "would be just as disruptive of harmonious relations as would a suit against a fellow serviceman" (*Hass*, 518 F.2d at 1143). Under the court of appeals' approach, FAA air traffic controllers assisting the military must now fear being haled into court to have their decisions called into question. Moreover, it appears that under the court of appeals' approach civilian employees

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[7] To these ends, the FAA is staffed with military liaison officers for the armed services and for numerous special military operations, including liaison officers for the Strategic Air Command and the Tactical Air Command. See *FAA Directory* 8-9 (1985). Military representatives also are stationed in FAA regional headquarters. See *id.* at 19, 25, 35, 67, 75, 107, 125. Similarly, FAA employees serve as liaison officers to the armed forces and many special military missions. See *FAA Order 7610.4F* at 21, 28, 32, 34, 40. In many cases the FAA and the armed services have entered into memoranda of understanding specifically detailing the duties of FAA employees in military operations. See, *e.g.*, Memorandum of Agreement Between FAA and the Army, Navy, and Air Force; Memorandum of Understanding Between Strategic Air Command and FAA Concerning Interagency Liaison; Memorandum of Understanding Between NORAD and FAA; Memorandum of Understanding Between Department of Defense and FAA; Memorandum of Understanding Between United States Naval Atlantic Fleet and FAA Concerning Interagency Liaison (all reprinted in *FAA Order 7610.4F* at 28-46).

assisting the military must act with the knowledge that their military judgments may be the basis for individual liability, although in our view state law tort claims alleging individual liability should be barred where the *Feres* doctrine precludes liability under the FTCA.[8] But to ensure the success of military activities, it is important that civilians participating in military activities "be ready to provide an effective defense on a moment's notice" (*Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 5) and act without hesitation or debate. Permitting service members to challenge the decisions of civilians working with the armed services, and "expos[ing] [civilians] to the chances of ruinous litigation" (*Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 37 (1827)), would inevitably cause some civilians to hesitate before acting. Because FAA air traffic controllers often work closely with the military, permitting service members injured incident to service to bring tort claims alleging negligence by an air traffic controller would undermine military effectiveness.

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[8] It is our view that federal employees are immune from common law tort actions arising in the course of their duties (see *Westfall* v. *Erwin*, petition for cert. filed, No. 86-714). Even if that view is rejected, where the government is immune under *Feres*, civilian personnel working with the military nevertheless should be immune from damage suits on behalf of service members injured incident to military service for the same reasons that the government is immune. As the court of appeals stated in *Jaffee*, in holding that state law claims against military and civilian personnel based on injuries incurred incident to service were barred: "Suits founded on state law have the same potential for undermining military discipline as federal tort claims. In addition, Veterans' Benefits are available for those bringing suits founded on state law, just as they are for those bringing federal tort claims suits." 663 F.2d at 1238-1239. However, if the *Feres* doctrine does not bar service members from bringing FTCA claims based on the negligence of civilian personnel, it would not bar state law tort claims against civilians assisting in military operations either.

b. Apart from the ways in which any litigation on behalf of an injured service member alleging negligence by an air traffic controller would interfere with military effectiveness, the court of appeals erred in its suggestion (Pet. App. 28a-29a) that since only the negligence of civilian employees was alleged, there will be no need for military officials to testify or for a court to scrutinize decisions made by military personnel in this case. In many instances, a trier of fact could not possibly evaluate the conduct of the FAA air traffic controllers without considering the military nature of the mission involved. At trial, the United States would be required to show that the air traffic controllers acted reasonably, which might require testimony describing the hazardous nature of the conditions, the danger involved in the particular rescue mission, and the pressing need to fly in weather not suited for civilian aircraft. These are matters "far removed from those * * * encounter[ed] in the ordinary run of civilian litigation" (*Noyd* v. *Bond*, 395 U.S. 683, 694 (1969)). Rather, they involve the peculiar demands of the military " 'without counterpart in civilian life' " (*Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983), quoting *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975)). Such testimony would, in many instances, be available only from military personnel.

Since the district court properly dismissed the case after concluding that the injury was incurred incident to service, it is not possible to describe precisely what harms to military discipline and effectiveness would result from trial here. It is clear, however, that to defend cases such as this the United States would sometimes be forced to place on trial military decisions—*i.e.*, to prove that it was military officials, whose actions could not be a basis for liability, rather than the civilian defendants who were negligent. Here, for example, to defend itself the United States may be required to prove that Lieutenant Com-

mander Johnson's death was the result of the negligence of his co-pilot or attributable to his superior officer's decision to send a helicopter aloft in poor weather conditions. That would require superior officers and military personnel to testify regarding their own military decisions and the decisions of others, and likewise demand that civilian courts evaluate the judgments of military personnel. This intrusive inquiry obviously would be destructive of military morale and would strike at the heart of the " 'peculiar and special relationship of the soldier to his superiors' " (*Shearer*, slip op. 5 (quoting *United States* v. *Muniz*, 374 U.S. at 162)).

Moreover, it is inevitable that cases involving dangerous military operations will raise questions of contributory negligence, again requiring service members to testify against each other and courts to judge the conduct of the injured party and others involved. In an air accident where the pilot was injured, for example, the United States might be required to argue that the pilot acted negligently, which might require the pilot's fellow service members and superior officers to second-guess the pilot's actions. And to rebut any adverse testimony from his superior officers and fellow soldiers, the service member might have to bring into court other superior officers or fellow service members to show that he acted properly, or that the other superior officers or fellow service members who testified were biased. It is difficult to conceive of a trial that would be more disruptive of the "established relationship between enlisted military personnel and their superior officers" (*Chappell*, 462 U.S. at 300).

c. Thus, contrary to the court of appeals' assertion, military discipline and effectiveness would most likely be hindered by a trial in any case where a service member injured incident to service alleges negligence on the part of an air traffic controller, and service members would almost certainly be brought into court and called upon to

account for their military decisions in this case. We submit more broadly, however, that courts should not inquire in each case as to whether a trial will involve sensitive military affairs or require members of the armed forces to testify against each other. Rather, as the Court held in *Feres*, claims should be barred wherever an injury occurs incident to military service.

The rule enunciated in *Feres* allows suit in most cases having no likely effect on military discipline and effectiveness. Once it is determined that an injury occurred incident to service, however, it is probable that ongoing relationships will be disrupted and military decisions called into question. It is also impossible to predict with certainty precisely what the consequences of proceeding to trial will be. Moreover, the process of inquiring into the facts surrounding an injury that occurred incident to service may be disruptive, so case-by-case inquiries to determine the effect of permitting cases to go forward can create the harm the *Feres* doctrine aims to prevent. Thus, the Court's holding in *Feres* was not based on any finding that in the particular cases (two of which were medical malpractice cases (see 340 U.S. at 137-138)) military discipline would in fact be disrupted. Instead, the Court held them barred because "they were the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer*, slip op. 6-7 (emphasis in original)).[9] Accordingly, if a service member is injured

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[9] Despite the Court's holding in *Feres*, the Ninth Circuit recently held that a servicewoman was not barred from bringing a malpractice claim under the FTCA alleging that she received negligent pregnancy care at an Army medical center. *Atkinson* v. *United States*, No. 85-2200 (Nov. 14, 1986). The court distinguished *Feres* by stating: "[P]regnant servicewomen did not serve on active duty in 1950 when *Feres* was decided. Thus, the Supreme Court, in barring the two malpractice claims in *Feres*, could not have had in mind the unique

incident to military service, a claim on his behalf is properly barred by the *Feres* doctrine whether the service member was injured as the result of negligence on the part of another service member or a civilian employee of the federal government.[10]

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facts involved in Atkinson's claim." Slip op. 8. The court then concluded that "[t]here is simply no connection between Atkinson's medical treatment and the decisional or disciplinary interest protected by the *Feres* doctrine" (*id.* at 9-10). The court failed to recognize that medical malpractice cases brought by service members are the type of claims that would undermine military discipline and effectiveness, as this Court noted in *Shearer*.

[10] In concluding that case-by-case inquiries are appropriate, the court of appeals relied (Pet. App. 4a) on the Court's statement in *Shearer* that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases" (slip op. 5). The court of appeals misread that comment, which was made in the context of rejecting the argument that *Feres* was inapplicable because the serviceman was off-duty and not on a military base at the time he was killed. The Court's comment and conclusion in *Shearer* that military discipline and effectiveness can be undermined in cases where an injury occurred while a service member was off-duty and off-base, based on the particular facts of the case, does not suggest that every case must be examined to see if permitting a trial to go forward would interfere with military effectiveness or call for judicial second-guessing of military decisions. Rather, as the Court made clear in its opinion in *Shearer*, immediately after the statement quoted above, the proper analysis is whether the plaintiff's claim is "the *type* of claim[]" that would generally involve the judiciary "in sensitive military affairs at the expense of military discipline and effectiveness" (slip op. 6-7). In *Shearer* the Court held that a claim that military personnel negligently supervised a serviceman, leading to the death of another serviceman, was the type of claim that would generally undermine military discipline and effectiveness, even though the injury in question occurred while the serviceman was off-duty and not on a military base. Similarly, claims for injuries incurred incident to military service on account of the negligence of civilian employees of the federal government are the type of claims that would undermine military discipline and effectiveness.

C. The Other Policies Underlying The *Feres* Doctrine—The Presence Of An Alternative Veterans' Benefits Compensation Scheme And The Distinctively Federal Relationship Between A Service Member And The Government—Are Applicable To Cases Involving Civilian Negligence

Apart from concerns about adverse effects on military discipline and effectiveness, the Court in *Feres* based its holding on two other factors. First, the Court relied on the fact that service members injured incident to service receive compensation under the Veterans' Benefit Act, "which provide[s] systems of simple, certain, and uniform compensation" (*Feres,* 340 U.S. at 144) and "provides an upper limit of liability for the Government on service-connected injuries" (*Stencel Aero Engineering Corp.*, 431 U.S. at 673). Second, the Court in *Feres* relied upon the irrationality of applying state tort law to govern the "distinctively federal" relationship between "the Government and members of its armed forces" (*Feres,* 340 U.S. at 145). These other factors are fully applicable to claims by service members alleging the negligence of civilian employees of the federal government.

1. After Lieutenant Commander Johnson's accident, respondent applied for and received the full range of veterans' benefits. See 38 U.S.C. 401-423, 701-788; note 1, *supra.* The Court in *Feres* held that where a service member is injured "incident to service" (*Feres,* 340 U.S. at 144-146), veterans' benefits are the "exclusive" and "sole remedy" (*Hatzlachh Supply Co.* v. *United States,* 444 U.S. 460, 464 (1980)). The Court in *Feres* began its construction of the FTCA by noting that the veterans' benefits enactments predated the FTCA, and provided "a comprehensive system of relief * * * for [military personnel] and their dependents" (340 U.S. at 140) for injuries incident to service. The Court noted that "in deciding claims for wrongs incident to service under the Tort Claims Act, [it could not] escape attributing some bearing upon it to enactments

by Congress which provide systems of simple, certain, and uniform compensation for injuries or death to those in the armed services" (*id.* at 144).

Accordingly, the Court stressed that the FTCA "should be construed to fit into the entire statutory system of remedies against the Government" (340 U.S. at 139). The Court saw no basis in either the language of the FTCA or its legislative history to suggest that the "comprehensive" (*id.* at 140) and "uniform" (*id.* at 144) scheme of the Veterans' Benefits Act was to be supplanted by the more general FTCA in cases involving claims for injuries incident to service. Indeed, the Court found that the only relevant evidence strongly suggested that the FTCA remedy was to be unavailable in such cases. The Court stated that "[i]f Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service" (*ibid.*).[11]

Since *Feres* the Court has held repeatedly that in cases involving injuries incident to service a service member's exclusive remedy is that available under the Veterans' Benefits Act. In *Stencel,* the Court stressed that "the Veterans' Benefits Act establishes, as a *substitute for tort liability,* a statutory 'no fault' compensation scheme * * * [that] provides an upper limit of liability for the Government as to service-connected injuries" (431 U.S. at 671,

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[11] In holding that veterans' benefits were the exclusive remedy for injuries incident to service, the Court in *Feres* distinguished its prior decision in *Brooks,* where a serviceman had been paid veterans' benefits for an injury but nonetheless was allowed to maintain an FTCA action. The Court in *Feres* saw as a "vital distinction" (*Feres,* 340 U.S. at 146) the fact that "[t]he injury to Brooks did not arise out of or in the course of military duty" (*ibid.*).

673 (emphasis added)). And in *Hatzlachh* the Court reaffirmed what had been made plain in *Feres* and *Stencel*: "[T]he Veterans' Benefits Act provided compensation to injured servicemen, which we [in *Stencel*] understood Congress intended to be the *sole remedy for service-connected injuries*" (444 U.S. at 464 (emphasis added)).

The reasoning in *Feres* has been applied by the Court in other cases to hold that a specific compensation scheme preempts an FTCA action. In *United States* v. *Demko*, 385 U.S. 149 (1966), the Court held that a federal prisoner who received compensation under 18 U.S.C. 4126 could not also bring an FTCA action. While there was no statutory provision deeming the Section 4126 remedy exclusive, the Court noted that "compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions" (385 U.S. at 151). Compare *Feres*, 340 U.S. at 143 (analogizing veterans' benefits to "workmens' compensation statutes which provide * * * the sole basis of liability"). And based on "rulings of this Court [that] have established as a general rule the exclusivity of a remedy under such compensation laws," the Court concluded that "where there is a compensation statute that reasonably and fairly covers a particular group * * *, it presumably is the exclusive remedy to protect that group" (*Demko*, 385 U.S. at 151, 152).[12]

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[12] Similarly, in *Brown* v. *GSA*, 425 U.S. 820, 825 (1976), the Court held that notwithstanding the absence of a specific exclusivity provision, Title VII is the exclusive remedy for claims of discrimination by federal employees. And recently the Court held that the Education Aid to Handicapped Children Act preempts more general constitutional claims alleging discrimination in the provision of education to handicapped children. See *Smith* v. *Robinson*, 468 U.S. 992, 1009-1013 (1984).

In disregarding respondent's receipt of veterans' benefits,[13] the court of appeals' decision contravenes the important policies which underlie the comprehensive statutory compensation scheme. In *Stencel,* the Court emphasized that this compensation scheme is significant "not only [because it] provides a swift, efficient remedy for the injured serviceman" (431 U.S. at 673), but also because it "provides an upper limit of liability for the Government as to service-connected injuries" (*ibid.*). As the Court has noted, activities that are incident to service involve "[s]ignificant risk of accidents and injuries" (*Stencel,* 431 U.S. at 672). This case dramatically demonstrates the point. Lieutenant Commander Johnson was called upon to participate in a dangerous military rescue operation. Indeed, as a "military service" (14 U.S.C. 1; see also 10 U.S.C. 101(4)) responsible for operating "rescue facilities * * * on, under, and over the high seas" (14 U.S.C. 2), the Coast Guard must necessarily undertake hazardous activities "without counterpart in civilian life" (*Councilman,* 420 U.S. at 757). Unfortunately, injuries inevitably arise out of such operations. The court of appeals' opinion, which exposes the United States to damages for injuries incident to such hazardous military missions, removes the " 'protective mantle of the Act's limitation-of-liability provisions' " (*Stencel,* 431 U.S. at 673, quoting *Cooper*

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[13] The court of appeals rejected respondent's claim that the receipt of veterans' benefits is irrelevant in applying *Feres* (Pet. App. 20a-21a & n.4), but the court nonetheless disregarded the fact that respondent is receiving veterans' benefits in reaching its decision. This Court has cautioned that factors other than the concern with military discipline and effectiveness are "no longer controlling" in *Feres* doctrine cases (*Shearer,* slip op. 6 n.4). Nonetheless, this Court and the courts of appeals have repeatedly relied on the fact that a plaintiff is receiving veterans' benefits in applying *Feres.* See *Shearer,* slip op. 6 n.4; *Stencel,* 431 U.S. at 672-673; *Carter,* 649 F.2d at 830; *Jaffee,* 663 F.2d at 1228; *Uptegrove,* 600 F.2d at 1250.

Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106, 115 (1974)), and thereby "frustrat[es] one of the essential features of [that scheme]" (*ibid.*) in cases involving the negligence of a civilian employee of the federal government.[14]

It is clear that the rule adopted by the court of appeals would allow for evasion of the *Feres* doctrine in a large number of cases. With the extensive civilian involvement in all activities incident to service, it would not be difficult for an injured service member to allege that his injury was the result of civilian negligence. Thus, if the court of appeals' decision were upheld, plaintiffs in many cases could avoid dismissal of their actions by focusing on actions taken by civilians. For example, *Feres* involved a claim of negligence on behalf of a service member who died in a fire in his barracks (see 340 U.S. at 137), and the Court held that an FTCA claim alleging negligence in the maintenance of the barracks was barred. But if the plaintiff had alleged negligence on the part of a civilian agency (such as the General Services Administration) that played some role in the provision of housing or office space to military personnel, that claim could be raised under the court of appeals' test.

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[14] Respondent's claim that this case is "no different * * * than it would have been if [Lieutenant Commander Johnson] had been employed by United Airlines" (Br. in Opp. 9) is particularly telling in this context. If Lieutenant Commander Johnson had been a pilot for United Air Lines, his sole remedy against his employer would have been workmen's compensation, the analogue to veterans' benefits. See *Feres*, 340 U.S. at 145. Moreover, if the FAA air traffic controllers had been injured during the course of the rescue operation, their sole remedy would have been provided by the Federal Employees Compensation Act. See 5 U.S.C. 8116(c). Thus, in holding that veterans' benefits are the exclusive remedy for injuries incident to service, the Court in *Feres* was treating service members the same as other federal employees and most private employees.

Similarly, the two companion cases decided with *Feres*, *Jefferson* v. *United States* and *United States* v. *Griggs*, involved claims of negligent medical care. See 340 U.S. at 137-138. It is not unusual for military personnel to receive medical treatment from civilian employees of the federal government. See *Certain Underwriters at Lloyd's*, 511 F.2d at 160. Here again, under the court of appeals' approach, the claims held barred in *Feres* could be raised simply by alleging only civilian negligence.[15] Plainly, to allow respondent's action and similar actions to be brought would be "to * * * admit at the back door that which has been * * * turned away at the front door" (*Laird* v. *Nelms*, 406 U.S. 797, 802 (1972)). There is no basis for concluding that this Court in *Feres* sought to permit evasion of its holding by artful pleading.[16]

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[15] Of course, the claims would be dismissed under the court of appeals' test if the court decided that military discipline and effectiveness would be disrupted by a trial in the particular case. However, given the court's inability to discern any possibility of disruption here, it seems that under the Eleventh Circuit's approach cases will be dismissed pursuant to the *Feres* doctrine only when it is clear and indisputable that a trial in a particular case will disrupt military discipline and effectiveness. That conclusion is made all the more clear by the court's recent decision in *Stanley*. In that case the court held that a trial of FTCA claims against the government and *Bivens* claims against a serviceman's superior officers and civilians working with them on chemical warfare tests would not disrupt military discipline and effectiveness because the service member injured in that case was not injured as the result of following a particular order (786 F.2d at 1496), even though it was absolutely clear that a trial in that case would require service members to testify concerning their military decisions. It thus appears that the Eleventh Circuit would find military discipline and effectiveness undermined sufficiently to bar a tort suit in the most extreme cases only.

[16] In addition, adopting the court of appeals' approach would lead to anomalous results that could not have been intended by Congress. In cases where there is no civilian whose negligence can be alleged—for example, where a service member receives medical care

2. The Court in *Feres* admonished that the "relationship between the Government and members of its armed forces is 'distinctively federal in character.' " *Feres,* 340 U.S. at 143, quoting *United States* v *Standard Oil Co.,* 332 U.S. 301, 305 (1947). Significantly, when expressing this concern the Court in *Feres* repeatedly described the crucial relationship that must be governed by federal law as the relationship "between the *Government* and members of its armed forces" (340 U.S. at 143 (emphasis added))—not simply the relationship between the various members of its armed forces. The armed services, as part of their "nationwide function in protecting the security of the United States, [must] frequently move large numbers of men * * * from one end of the continent to the other, and beyond" (*Stencel Aero Engineering Corp.,* 431 U.S. at 672). Given "the need for uniform legal standards for military personnel, who must frequently travel between the various states" (*Jaffee,* 663 F.2d at 1239), the Court in *Feres* found that Congress did not intend for state law, which governs in FTCA actions (28 U.S.C. 1346(b)), to apply to this distinctively federal relationship. See *Feres,* 340 U.S. at 143-144. Just as it "would hardly be a rational plan" (*Feres,* 340 U.S. at 143) to have state law govern what Lieutenant Johnson's superior officers or fellow service members did in this military operation, it would "make[] no sense" (*ibid.*) to have the varying laws of the fifty

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from military personnel only—an FTCA claim would be barred by *Feres* and veterans' benefits would be the exclusive remedy. But in a case where medical care is received from both military and civilian personnel, the claim would not be barred under the court of appeals' approach, and the service member could receive both veterans' benefits and damages under the FTCA. It is quite unlikely that Congress intended service members identically situated to have such vastly different remedies based on the fortuity of who provided the medical care. Cf. *Feres,* 340 U.S. at 143.

states govern military decisions and judgments made by civilians playing a crucial role in this very same military operation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1986

U.S. GOVERNMENT PRINTING OFFICE: 1986—181 483/40090

Supreme Court, U.S.
FILED
DEC 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,

vs.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HORTON JOHNSON, DECEASED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,

vs.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HORTON JOHNSON, DECEASED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATUTES

The Government has set forth only one of the relevant statutes in its brief, the statute creating jurisdiction in United States District Courts over claims arising under the Federal Tort Claims Act (FTCA). The plaintiff's substantive cause of action for wrongful death against the Government is created elsewhere in 28 U.S.C., Ch. 171, §§2671-80.

28 U.S.C. §2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. §2680 provides in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> . . . .
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

STATEMENT

The Government's statement of the facts is neither complete nor entirely accurate. A brief supplementation is therefore necessary. The plaintiff's complaint was dismissed upon motion by the district court, so the only "facts" in the record are the allegations of the plaintiff's complaint—which read in pertinent part as follows:

> 5. On January 7, 1982, plaintiff's decedent was a member of the U.S. Coast Guard, stationed in Hawaii, and a helicopter pilot.
>
> 6. In the early morning hours of January 7, 1982, plaintiff's decedent, while acting incident and pursuant to the Coast Guard's quasi-civilian mission to provide search and rescue efforts for civilians in distress,

undertook a rescue mission aboard a Coast Guard Helicopter which was designed to assist a civilian boat that had issued a distress call. The mission therefore had no relationship whatsoever to any military objective of the United States government.

7. During the rescue mission, while over open ocean, plaintiff's decedent requested the civilian Federal Aviation Administration controller to assume positive radar control over the helicopter because of poor weather and visibility, which made visual control of the helicopter by plaintiff's decedent impossible.

8. Because of the poor visibility, the civilian FAA controller at Honolulu ARTCC did assume radar control over plaintiff's decedent's aircraft, which control was designed to allow the FAA controller to plot a course for plaintiff's decedent and guide the helicopter through the inclement weather.

9. The FAA controllers responsible for guiding plaintiff's decedent's helicopter were civilians, were not members of the Coast Guard or any other branch of the military service, and at all times acted within the course and scope of their employment by the defendant United States as civilian air traffic controllers.

10. Plaintiff's decedent's helicopter was flying under Instrument Flight Rules (rather than visual flight rules, where plaintiff's decedent would have been responsible for the path of the helicopter) and under the radar control of the FAA at the Honolulu ARTCC.

11. The civilian FAA controllers were negligent in their control and guidance over decedent's helicopter and negligently guided the helicopter directly into

the side of a mountain on the island of Molokai. In fact, J. Lynn Helms, FAA Administrator, has admitted in a public interview that the FAA erred in guiding the helicopter. A copy of the interview, at p. 51 of the August 9, 1982, issue of *U.S. News & World Report* is attached.

12. As a proximate result of the negligence of the civilian FAA controllers, plaintiff's decedent was killed.

(R. 1-3).[1]

There is no responsive pleading in the record, so these allegations—including the Government's public admission of controller error—stand admitted on the record. It is upon these admitted facts, of course, that the court of appeals' decision squarely turns:

> . . . The complaint in this case alleges that plaintiff's decedent was killed because civilian FAA air traffic controllers negligently guided the helicopter he was piloting into a mountain. There is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial. Nor is there a suggestion that examining the conduct of a civilian would in any way implicate the military services. Since the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military disciplinary structure, the prosecution of plaintiff's claim will not encroach upon the rationale

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1. The more specific facts which we intend to prove in support of these general allegations are set forth briefly in footnote 9, *infra*.

> which "serves largely if not exclusively as the predicate for the *Feres* doctrine." . . . We therefore are unable to discern any sound reason for barring plaintiff's suit under the *Feres* doctrine.

Johnson v. United States, 749 F.2d 1530, 1539 (11th Cir. 1985), *approved on reh'g en banc*, 779 F.2d 1492 (11th Cir. 1986) (footnotes omitted).

SUMMARY OF ARGUMENT

The Government asserts that, prior to this case, the lower courts had consistently applied the *Feres* doctrine to bar claims by service members, whether by acts of civilian or military employees of the Government. This assertion is incorrect. *Some* of the lower courts had consistently applied *Feres* in that manner, because they reached the conclusion that the "status" of the claimant was the touchstone of the *Feres* doctrine. Over the years, however, this Court refined the foundations of the *Feres* doctrine, announcing that the doctrine "seems best explained" by only one of its initially articulated rationales —what has now become known as the "military discipline rationale".

With that lead, the lower courts began looking beyond the purely "status-related" test of the earlier decisions to the *reasons* underlying the *Feres* doctrine, and began declining to erect the *Feres* bar when its primary rationale was not implicated by the facts of the particular case. As a result of this shift in methodology, there are numerous recent decisions of the lower courts, including the decision under review, which hold that the *Feres* bar should be interposed only when pursuit of the litigation would involve the judiciary in sensitive military affairs at the

expense of military discipline. Clearly, there is no consistency at all among the lower courts where application of the *Feres* doctrine is concerned.

It would also appear that this Court's latest foray into the field recognized the ongoing debate among the lower courts, and at least tentatively resolved that debate in a manner consistent with the lower court's resolution of the instant case. In *United States v. Shearer*, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985), this Court reiterated that *Feres* "seems best explained" by the military discipline rationale, and it observed that the other rationales advanced in the past as support for the *Feres* doctrine were "no longer controlling". The Court also appears to have rejected the position advanced by the Government here—that application of the *Feres* bar depends exclusively upon the active-duty status of the serviceman, rather than the extent to which the facts implicate the reason for the doctrine—and it appears to have announced that the *Feres* bar should be erected only where the facts upon which the suit is bottomed would involve the judiciary in sensitive military affairs at the expense of military discipline. We therefore think that *Shearer* implicitly approves the reasoning utilized by the Court below—and, if the lower court was correct that maintenance of this action will not impair military discipline, the correctness of the result reached upon that reasoning follows in due course.

Although the Government has only grudgingly conceded the relevance of *Shearer* here, it has apparently read the handwriting on the wall—and the bulk of its brief is therefore devoted to an attempt to disprove the lower court's conclusion that this action will not impair military discipline. All of the so-called "sensitive mil-

itary matters" which the Government has injected into this case to that end are purely hypothetical, however. They should never arise in this litigation, because the Government has already publicly admitted its liability, and the only issues which are likely to be tried in this case are the damage issues. In any event, the very most that the record in this case presently reflects is straightforward negligence by an air traffic controller under routine flight conditions, and that the litigation of this case will be no different in any respect than it would have been if LCDR Johnson had been a civilian. Suits by the survivors of civilian pilots against the FAA have never been barred by the *Feres* doctrine, and there is no reason why the instant suit should be barred merely because LCDR Johnson happened to be wearing a uniform when he requested routine civilian air traffic control service.

If the Court is at all concerned about any of the hypothetical assertions with which the Government has attempted to salvage *Feres* on the straightforward facts in this case, the very worst that it should do is allow the case to proceed so that the facts can be sufficiently developed to determine if the Government's concerns have any foundation. That alternative disposition is important to us, because we know what the facts will be in this case, and we know that they will not implicate any of the Government's hypothetical concerns. The Government is also well aware of that fact—and it should not be allowed to escape this litigation for reasons it cannot prove, simply because it has never been called upon to prove them.

The Government's miscellaneous contention, that this Court should read an "exclusive remedy" provision into

the Veterans' Benefits Act, has been rejected by this Court on several prior occasions, and it should be rejected again for the same reasons—especially since the Veterans' Benefits Act expressly recognizes the potential of duplicate benefits under the FTCA, and provides a method for offsetting cumulative recoveries. The Government's other miscellaneous concern, that it would be anomalous for its liability to be determined by the different laws of the several states, might be a relevant concern if our suit involved the negligence of a fellow serviceman; it is not a relevant concern here, however, because our suit involves the negligence of an air traffic controller employed by the FAA. The FTCA provides that the propriety of the conduct of air traffic controllers is to be judged by the laws of the several states; the laws of the several states are routinely applied to that issue in suits involving civilian plaintiffs; and no reason suggests itself why it would be anomalous for the same laws to govern disposition of the instant case.

In short and in sum, because maintenance of the plaintiff's FTCA action will not involve the judiciary in sensitive military affairs at the expense of military discipline, *Feres* is a rule without a reason on the facts in this case. Simply because LCDR Johnson was wearing a uniform at the time of his death is no justification for depriving his survivors of the remedy provided by Congress to the citizens of this nation who suffer damage because of the negligence of the Government. The issue presented here was correctly decided by the lower court, and its decision should be affirmed.

ARGUMENT

THE FERES DOCTRINE DOES NOT BAR THE PLAINTIFF'S CONGRESSIONALLY-AUTHORIZED WRONGFUL DEATH ACTION, BECAUSE PROSECUTION OF THE ACTION WILL NOT IMPLICATE THE ONLY SUBSTANTIAL REASON FOR THE DOCTRINE—THE NEED TO PREVENT JUDICIAL INVOLVEMENT IN SENSITIVE MILITARY AFFAIRS AT THE EXPENSE OF MILITARY DISCIPLINE.

The FTCA waives the historical immunity of the sovereign, and authorizes tort actions against the Government for the negligence of its employees. If LCDR Johnson had been a civilian member of, for example, the Civil Air Patrol, his wrongful death would clearly have been actionable under the FTCA. Unfortunately (perhaps) for his survivors, however, he was a member of the Coast Guard at the time the Government directed him to fly his aircraft into the side of a mountain. In its broadest sense, therefore, the issue presented here is whether Mr. Johnson's different "status" as a "serviceman" should make a difference. By its express terms, the FTCA rather emphatically says "no"—since its exceptions (insofar as they are relevant here) retain immunity only for "claim[s] arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*". 28 U.S.C. §2680(j) (emphasis supplied). In a narrower sense, therefore, the issue presented here is whether this Court should create an exception to the FTCA which Congress did not.

In *Feres v. United States*, 340 U.S. 135, 138 (1950), this Court did create a limited exception to the FTCA for suits brought against the Government by servicemen

alleging the "negligence of others in the armed forces". Despite decades of pointed criticism, this decision has survived the scrutiny of time, and we do not intend to quarrel with it here. Our quarrel is with the Government's attempt to expand the narrow exception created by *Feres* to cover the quite different circumstance presented by this case. The precise issue presented here is therefore this: should the limited exception to the FTCA represented by *Feres* be expanded to bar suits against the Government brought by servicemen to redress injuries caused by the negligence of civilian employees of a civilian agency of the Government. Until this case, that precise issue has never been squarely presented to this Court.[2]

Although the issue is obviously an important one, our argument will be brief—for several reasons. First, this Court has decided enough "*Feres* doctrine" cases in the recent past that it needs no lengthy exegesis upon its long and tortured history. Second, the Court is also undoubtedly aware that the doctrine has been so widely criticized over the years that it is now commonly referred to as the "much-maligned *Feres* doctrine", and that there is presently a strong contingent in Congress with plans to modify it (at least in the area of medical malpractice), so no lengthy analysis of the critical commentary would seem to be necessary. Third, the panel which initially decided

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2. The Government has culled a few isolated phrases from some of this Court's past decisions, and has asserted that this Court has always prohibited FTCA actions by servicemen for the negligence of Government "officials" and "agents"—whether military or civilian. That, of course, is simply not true. *See Brooks v. United States*, 337 U.S. 49 (1949); *United States v. Brown*, 348 U.S. 110 (1954). In addition, however phrased, all of this Court's past decisions involved essentially intramilitary disputes. This is clearly the first case in which this Court has ever considered whether *Feres* bars a serviceman's action for injury caused by the negligence of a civilian employee of a civilian agency of the Government.

this case below filed a thorough and thoughtful opinion which states our position here much more eloquently than we could ever have hoped to do, and we are content to let that opinion speak largely for itself. Finally, if the 8-4 decision of the en banc court (which approved the panel's opinion) correctly interpreted the strong signals sent by this Court's recent decision in *United States v. Shearer*, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985), the issue presented here has effectively been decided by this Court. For all of these reasons, we will rely in large measure upon the court of appeals' decision for our primary argument here, and limit our response to the Government's brief accordingly.

A. Recent developments in the decisional law demonstrate that the Feres doctrine should bar an FTCA action only when its primary rationale is implicated.

The Government first contends that, "[p]rior to this case, the courts had consistently applied the *Feres* doctrine to bar claims by service members injured incident to service, whether by acts of civilian or military employees of the Federal government" (petitioner's brief, p. 9). This assertion is incorrect. It is true that *some* of the lower courts have consistently applied the *Feres* doctrine in that manner, and the Government has cited a number of those decisions to the Court. However, it is not true that *all* of the lower courts have applied the *Feres* doctrine in that manner. In fact, there are two quite separate approaches to application of the *Feres* doctrine presently in use in the lower courts (one of which the Government has simply ignored here), which is probably why this Court granted certiorari in this case.

As the panel's opinion in this case explains, this Court initially articulated several "rationales" for its creation of the *Feres* doctrine. Because some of those reasons (like the "distinctively federal character of the relationship", and the availability of VA benefits) existed in every suit brought by a serviceman against the Government under the FTCA, lower courts began applying a "bright-line rule"—erecting the *Feres* bar automatically whenever the plaintiff occupied the "status" of "active duty serviceman". *E. g., Carter v. City of Cheyenne*, 649 F.2d 827, 830 (10th Cir. 1981) (". . . the status of the deceased or injured person is that which controls in determining whether the claimant may recover under the Tort Claims Act"); *Uptegrove v. United States*, 600 F.2d 1248, 1249 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980) (". . . only the status of the plaintiff, and not that of the tortfeasor, can be considered in determining the applicability of the *Feres* doctrine"); *United States v. Lee*, 400 F.2d 558, 562 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969) (". . . the status of the deceased or injured person controls"); *Watkins v. United States*, 462 F. Supp. 980, 985 (S.D. Ga. 1977), *aff'd on opinion below*, 587 F.2d 279 (5th Cir. 1979) (". . . the determinative factor under the *Feres* doctrine is the status of the claimant"). It is these purely "status-related" decisions upon which the Government bottoms its position here.

When applied, of course, the *Feres* doctrine is (in effect) a license for tortious conduct and a mandate of second-class citizenship for servicemen. It therefore did not sit lightly with the lower courts or the commentators. Neither did this Court treat it lightly, and over the course of the years that followed, it refined the foundations of the doctrine, announcing that the doctrine "seems best explained"

by only one of the initially articulated rationales—what has now become known as the "military discipline rationale". *United States v. Brown*, 348 U.S. 110, 112 (1954); *United States v. Muniz*, 374 U.S. 150, 162 (1963); *Chappell v. Wallace*, 462 U.S. 296, 299 (1983); *United States v. Shearer*, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38, 44 (1985).

With that lead, the lower courts began looking beyond the purely "status-related" test of the earlier decisions to the *reasons* underlying the *Feres* doctrine, and (as the panel's opinion explains in detail) began declining to erect the *Feres* bar when the primary rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine" was not implicated by the facts of the particular case. *Hunt v. United States*, 636 F.2d 580, 599 (D.C. Cir. 1980). *See Scales v. United States*, 685 F.2d 970, 973 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) ("*Stencel* and its progeny direct our inquiry to the manner in which the policies underlying *Feres* are affected—specifically the impact on military discipline—rather than to the status of the claimant").

As a result of this shift in methodology, there are numerous recent decisions of the lower courts which decline to erect the *Feres* bar merely because the plaintiff was an active duty serviceman and his injury occurred, in the Government's words, "incident to service".[3] Instead, these decisions hold, in effect, that only one of the rationales initially supporting the *Feres* doctrine has sur-

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3. The term, "incident to service", is clearly no longer a definitive term, if it ever were. It is, or at least has become, a term of art—a mere shorthand method of encapsulating the type of claim which *Feres* bars. It is also entirely too vague to serve as the type of "bright-line rule" which the Government attempts to construct upon it, as the hundreds of decisions which have wrestled with the concept it encapsulates amply illustrate.

vived the scrutiny of time, and that the *Feres* bar should be interposed only when pursuit of the litigation would involve the judiciary in sensitive military affairs at the expense of military discipline. *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983), is representative, and we will let its analysis speak for the remaining cases which have reached the same conclusion:

> In defense of its judicially-created "incident to service" exception to the FTCA, the *Feres* Court offered three basic rationales. As the Supreme Court summarized in its most recent discussion of *Feres*, the "incident to service" test is predicated on the "distinctly federal" relationship between the United States and its service personnel, on the presence of an alternative military compensation system, and on the fear of damaging the military disciplinary structure. *See generally Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72, 97 S. Ct. 2054, 2057-58, 52 L. Ed.2d 665 (1977). *See also Davis v. United States*, 667 F.2d 822, 825 (9th Cir. 1982); *Lewis v. United States*, 663 F.2d 889, 890 (9th Cir. 1981); *Hunt v. United States*, 636 F.2d 580, 597 (D.C. Cir. 1980).
>
> Decisions subsequent to *Feres* have substantially weakened the persuasive force of the first two rationales. The argument that the military relationship is distinctly federal applies with equal force to other federal agencies that are liable under the FTCA. *See, e. g., Jaffee v. United States*, 663 F.2d 1226, 1233 n. 7 (3d Cir. 1981) (en banc), *cert denied*, 456 U.S. 972, 102 S. Ct. 2234, 72 L. Ed.2d 845 (1982). The second rationale—the existence of an alternative compensation system—has also been applied inconsistently by the Supreme Court. Although the Court mentioned this

argument in *Stencel* and *Feres*, it has rejected it in other equally appropriate cases. *See, e. g., United States v. Brown*, 348 U.S. 110, 113, 75 S. Ct. 141, 143, 99 L. Ed. 139 (1954); *Brooks v. United States*, 337 U.S. at 53, 69 S. Ct. at 920. In short, we agree that "given the Supreme Court's inconsistent treatment of this factor, it cannot be said that the presence of an alternative compensation system either explains or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable." *Hunt v. United States*, 636 F.2d at 598. *See also Parker v. United States*, 611 F.2d 1007, 1011 (5th Cir. 1980); *Healy v. United States*, 192 F. Supp. 325, 328 n. 13 (S.D. N.Y.), *aff'd*, 295 F.2d 958 (2d Cir. 1961).

In sum, the most persuasive justification for the *Feres* doctrine is the potential impact of civil suits on military discipline. After reviewing the *Feres* doctrine, the Supreme Court concluded that the incident to service exception is "best explained" by the disciplinary rationale. *United States v. Muniz*, 374 U.S. 150, 159-62, 83 S. Ct. 1850, 1856-57, 10 L. Ed.2d 805 (1958). As the Court has noted,

> the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Torts Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read the act as excluding claims of that character.

United States v. Brown, 348 U.S. at 112, 75 S. Ct. at 145. *See also Hunt v. United States*, 636 F.2d at 599 ("the protection of military discipline . . . serves

> largely if not exclusively as the predicate for the *Feres* doctrine . . . Only this factor can truly explain the *Feres* doctrine and the crucial line it draws . . . ."); *Parker v. United States,* 611 F.2d at 1010; *Viellette v. United States,* 615 F.2d 505, 506 (9th Cir. 1980).
>
> Thus, the necessity of safeguarding military discipline provides the most fundamental rationale for limiting recovery under the FTCA to injuries that are not incident to military service . . . .

704 F.2d at 1435-36.

The court thereafter concluded that, although the facts before it implicated the first two rationales of *Feres*, those rationales were essentially irrelevant—and that its sole task was to determine "whether or not the service member's activities at the time of injury are of the sort that could harm the disciplinary system if litigated in a civil action". *Id.* at 1439. The court then identified the type of activities which could harm military discipline if litigated in a civil action as follows:

> Courts interpreting *Feres* have identified two distinct ways in which military discipline could be impeded by the possibility of civil suits concerning activities bearing a strong relationship to military affairs. First, military decision-makers subject to civil suit "might not be willing to act as quickly and forcefully as is necessary, especially during battlefield conditions," if their actions could be second-guessed in a civilian court. *Jaffee v. United States,* 663 F.2d at 1232. *See also Stencel Aero Engineering Corp. v. United States,* 431 U.S. at 673, 97 S. Ct. at 2059. Second, encouraging military personnel to question decisions by their superiors might have some effect on the willingness of

> such personnel to follow orders. *See, e. g., Jaffee v. United States*, 663 F.2d at 1232; *Hunt v. United States*, 636 F.2d at 599.

704 F.2d at 1439. The court then reviewed the facts before it (active duty serviceman injured by active duty serviceman in automobile accident following after-hours party at NCO club where serviceman had been moonlighting as a bartender); concluded that military discipline could not conceivably be affected by allowing the serviceman's suit against the Government; and held that *Feres* did not bar the suit.

The *Johnson* court summarized its reading of *Feres* as follows: "In sum, where there is no relevant relationship between the service member's behavior and the military interests that might be jeopardized by civil suits, the *Feres* doctrine cannot bar recovery." 704 F.2d at 1440. This conclusion it seems to us, completely undermines the Ninth Circuit's prior "status-related" decisions in *Uptegrove* and *Lee*, both of which involved the negligence of air traffic controllers (and both of which the Government has relied upon here). It undermines them because they are both based exclusively on the first two rationales of *Feres*, and because the necessity of safeguarding "military discipline" is implicated *only* in those cases where a serviceman is suing the Government for the negligence of a fellow serviceman; it is not implicated in a suit by a serviceman against the Government for the negligence of a civilian employee of a civilian agency of the Government.

As we noted, in addition to the lower court's decision in the instant case, there are numerous recent decisions reaching essentially the same conclusion on essentially the same analysis. *E. g., Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986); *Stanley v. United States*, 786

F.2d 1490 (11th Cir. 1986), *cert. granted* (Dec. 8, 1986; case no. 86-393); *Cole v. United States*, 755 F.2d 873 (11th Cir. 1985); *Roush v. United States*, 752 F.2d 1460 (9th Cir. 1985); *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 3524, 87 L. Ed.2d 650 (1985); *Brown v. United States*, 715 F.2d 463 (9th Cir. 1983); *Hunt v. United States*, 636 F.2d 580 (D.C. Cir. 1980); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980); *Cooper v. Perkiomen Airways, Ltd.*, 609 F. Supp. 969 (E.D. Pa. 1985). In our judgment, these cases represent a much more principled resolution of the problem, because a judicially-created exception to a remedial Act of Congress should have a *substantial* reason to support it, and it should only be applied when that substantial reason is implicated.

It is true, as the Government points out, that nearly all of the "serviceman vs. civilian" cases which it has collected here have applied the *Feres* bar, but that is because they relied upon the now-discredited "status-related" test—a test in which the status of the tortfeasor was *a priori* irrelevant, and the effect which the suit might have on military discipline was not considered a particularly relevant consideration. It is also true, as the Government will no doubt point out, that most of the cases which we have collected above are "serviceman vs. serviceman" cases. That should clearly be irrelevant here, however. Certainly, a lower court which would refuse to erect the *Feres* bar in a "serviceman vs. serviceman" case, where military discipline would not be compromised, would not erect it in a "serviceman vs. civilian" case, like this one, for exactly the same reason. Clearly, if application of the *Feres* doctrine depends upon the *reason* for the doctrine, rather than the status of the claimant, then all of the courts whose recent decisions are cited above would have

decided the instant case exactly as the lower court decided it. The Government's assertion to the contrary notwithstanding, there is clearly no consistency at all among the lower courts where application of the *Feres* doctrine is concerned.[4]

It would also appear that this Court's latest foray into the field recognized the ongoing debate among the lower courts concerning the bases for application of the *Feres* doctrine, and at least tentatively resolved that debate—in a manner consistent with the lower court's resolution of the instant case. In *United States v. Shearer*, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985), this Court reiterated that "*Feres* seems best explained" by the military discipline rationale, and it observed that the other rationales advanced in the past as support for the *Feres* doctrine were "no longer controlling". *Shearer*, 87 L. Ed.2d at 44, 44 n. 4. The Court also appears to have rejected the position advanced by the Government here—that application of the *Feres* bar depends exclusively upon the active-duty status of the serviceman, rather than the extent to which the facts implicate the only substantial reason for the doctrine —noting that "[t]he *Feres* doctrine cannot be reduced to

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4. That there are presently two conflicting methodologies at work in the lower courts is illustrated by the majority and dissenting opinions of the en banc court in this case, of course. It is also nicely illustrated by *West v. United States*, 729 F.2d 1120 (7th Cir.), *vacated*, 744 F.2d 1317 (7th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1053 (1985). In that case, the district court initially dismissed an FTCA action brought by a serviceman for injuries suffered by his children as a result of the Government's negligent typing of his blood. Utilizing the analysis which the lower court used in the instant case, the panel which initially decided the appeal unanimously reversed, holding that the action would not impair military discipline and that *Feres* therefore did not bar it. The court granted rehearing en banc. The eight judges who reheard the case were unable to reach a consensus, and the district court's dismissal was thereafter affirmed because of an equally-divided vote of the en banc court.

a few bright-line rules" . . . and that the *Feres* bar should be erected only where "the suit requires the civilian court to second-guess military decisions . . . and . . . the suit might impair essential military discipline."[5] *Id.* This Court also stated that the *Feres* doctrine barred the "*type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness". *Id.* at 45 (emphasis in original). There is not even a hint in the Court's opinion that its application of the *Feres* doctrine turned in any way upon the mere fact that the plaintiff's decedent was a serviceman and the defendant was the Government.

We cannot read this Court's mind, of course, but we think it not improbable that the *Shearer* opinion was drafted with the instant case clearly in mind. At the very least, *Shearer* makes it clear that the purely "status-related" decisions upon which the Government relies involve an oversimplified and now-suspect methodology, and that it is the underlying *reason* for the *Feres* doctrine which must control its application to any given set of facts. We therefore think that *Shearer* implicitly approves the reasoning utilized by the court below—and, if the lower court was correct that maintenance of this action will not "involve the judiciary in sensitive military affairs at the expense of military discipline", the correctness of the result reached upon that reasoning follows in due course.

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5. The Government attempts to finesse this pointed advisory by arguing that the "bright-line rule" rejected in *Shearer* involved the *situs* of the tort. This Court did not merely reject one "bright-line rule", however; it stated that the *Feres* doctrine "cannot be reduced to a few bright-line rules". Surely, the purely "status-related" decisions upon which the Government relies depend upon one of the "bright-line rules" disavowed in *Shearer*.

B. Allowing this action to proceed will not involve the judiciary in sensitive military affairs at the expense of military discipline.

1. Although the Government has only grudgingly conceded the relevance of *Shearer* to this case, it has apparently read the handwriting on the wall—and the bulk of its brief is therefore devoted to an attempt to demonstrate that this action will impair military discipline. The 8-4 majority of the lower court expressly found to the contrary, of course—and not even the dissenting judges (who relied exclusively on the now discredited "status-related" progeny of *Feres*) concluded to the contrary. Although this 12-0 vote against the Government's position on this point should probably be dispositive of its propriety here, we feel constrained to respond to it briefly.

The first thing which we should observe is that all of the so-called "sensitive military matters" which the Government has injected into this case in an effort to implicate the underlying rationale of *Feres* are purely hypothetical. It is also highly unlikely that any of those purely hypothetical issues will ever actually be asserted by the Government in this litigation. As our complaint alleges, the Government has already publicly admitted its negligence in this case. That allegation has yet to be denied in this proceeding in any way, and if the Government acts in good faith toward the plaintiff upon remand, it will admit its liability once again. In short, the only issues which are likely to be tried in this case are the damage issues—and there is nothing in the FTCA (or the *Feres* doctrine) which purports to preclude litigation of those issues. *See Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).

In any event, the very most that the record in this case presently reflects is that LCDR Johnson requested routine air traffic control service, by radio request to a conventional air route traffic control center, when his helicopter encountered instrument flight conditions, as any pilot—civilian, military, foreign, or otherwise—was required to do by federal regulation. No contention has been made that the Coast Guard was negligent in launching the rescue mission at issue in this case, or negligent in any other way. Neither has any contention been made that the weather conditions were so bad that non-military air traffic could not operate in them. Neither has any contention been made that LCDR Johnson's mission was any more dangerous than flight under instrument conditions by a civilian aircraft. Neither has any contention been made that LCDR Johnson was involved in any of the types of "Special Military Operations" described in the Department of Transportation Manual which the Government has added to the record here.

Neither has the Government alleged contributory negligence on the part of LCDR Johnson at this stage of the proceedings. But even assuming that this issue might ultimately surface in the litigation, there will still be only two very narrow factual issues to be decided—whether, after LCDR Johnson submitted his helicopter to the positive control of the Government's air traffic controllers, appropriate directions concerning altitude and heading were given to him, and whether he piloted his helicopter properly in light of those directions. Those questions will not implicate anything even remotely "military" (and especially not anything in the nature of "military discipline")—and their answers will depend solely upon Federal Air Traffic Control Regulations promulgated by the

FAA, which apply equally to civilian and military aircraft alike.[6]

We also think that a claim of contributory negligence would be qualitatively different than the type of claim which this Court has thought necessary to preclude in the past, because it would not involve a claim by one serviceman against another. It would only be a claim by the Government—in its *respondeat superior* status as defendant, because of the acts of one of its civilian employees in another department—that the single serviceman-plaintiff had been negligent. In our judgment, that type of claim does not threaten military discipline in the same way that the typical *Feres* paradigm threatens discipline, if it threatens it at all.

In short, the litigation of this case will be no different in any respect than it would have been if the plaintiff's

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6. 49 U.S.C. §1348(c) directs the Secretary of Transportation "to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft , . . . and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision . . .". 49 U.S.C. §1348(f) makes it perfectly clear that all military aircraft are required to comply with the regulations directed by subsection (c), except in the following narrow circumstances:

> When it is essential to the defense of the United States because of a military emergency or urgent military necessity, and when appropriate military authority so determines, and when prior notice thereof is given to the Secretary of Transportation, such military authority may authorize deviation by military aircraft of the national defense forces of the United States from air traffic rules issued pursuant to this subchapter. Such prior notice shall be given to the Secretary of Transportation at the earliest time practicable and, to the extent time and circumstances permit, every reasonable effort shall be made to consult fully with the Secretary of Transportation and to arrange in advance for the required deviation from the rules on a mutually acceptable basis.

We assure the Court that this exception will never be implicated on the facts in the instant case, and that this is a straightforward case governed by air traffic rules promulgated by the FAA which apply equally to all pilots operating in the national airspace.

decedent had been employed by United Air Lines.[7] Suits by the survivors of commercial airline pilots against the FAA for the negligence of air traffic controllers have never been barred by the *Feres* doctrine, notwithstanding the clearly symbiotic relationship of the FAA and the commercial airline industry, because a suit against the Government for the negligence of the FAA does not charge anyone in the military with misfeasance; it does not bring the actions of military servicemen under judicial scrutiny; and it poses no threat to the military disciplinary structure whatsoever. *See, e. g., Daley v. United States*, 792 F.2d 1081 (11th Cir. 1986); *Foss v. United States*, 623 F.2d 104 (9th Cir. 1980). If an FTCA action is not inappropriate in that circumstance, it is not inappropriate in this case merely because LCDR Johnson happened to be wearing a uniform when he requested routine civilian air traffic control service.[8]

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7. Curiously, the Government asserts that this fact militates in its favor:

> Respondent's claim that this case is "no different * * * than it would have been if [Lieutenant Commander Johnson] had been employed by United Airlines" (Br. in Opp. 9) is particularly telling in this context. If Lieutenant Commander Johnson had been a pilot for United Air Lines, his sole remedy against his employer would have been workmen's compensation, the analogue to veterans' benefits. . . .

(Petitioner's brief, p. 26 n. 14). His sole remedy against his employer (if his employer had been a negligent cause of his death) may well have been worker's compensation, but if his death had been caused by the negligence of an FAA air traffic controller, his sole remedy would be against the Government under the FTCA. And, as we shall demonstrate in the next subsection of this argument, unlike the typical Workers' Compensation Act, the Veterans' Benefits Act does not contain an "exclusive remedy" provision.

8. The Government's concern that the effectiveness of its air traffic controllers will be compromised—because of their "fear [of] being haled into court to have their decisions called into question" and their fear of potential "individual liability"

(Continued on following page)

The instant case is no different than the case in which a serviceman is struck by an errant bullet negligently fired by an FBI agent into the crowd at an Army-Navy game, or the case in which a serviceman is run over by an automobile operated by a lawyer employed by the Department of Justice. There is also very little difference between this case and *Brooks v. United States*, 337 U.S. 49 (1949), or *United States v. Brown*, 348 U.S. 110 (1954) —at least where compromise of the military disciplinary structure is concerned. The *reason* for the *Feres* doctrine is simply not implicated here, so the *Feres* doctrine is not implicated either. Re-erection of the "bright-line rule" which this Court disavowed in *Shearer* is not necessary here—and the Government's hypothetical cases can clearly be reserved for another day.

2. In any event, if the Court is at all concerned about any of the hypothetical assertions with which the Government has attempted to salvage *Feres* on the straightforward facts in this case, we suggest that the appropriate response would not be dismissal of the plaintiff's congressionally-authorized action at the threshold—on the mere allegations of the complaint, and on the ground of

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Footnote continued—

(petitloner's brief, pp. 16-17)—is no reason to prohibit the plaintiff's action. The Government's air traffic controllers work under the pressure of exercising reasonable care as a function of their job, and they are routinely "haled into court" to account for their negligent actions with respect to civilian pilots and passengers, because Congress has waived the Government's immunity from such suits. Authorizing the instant suit will therefore not impact their effectiveness in any way—although it will certainly give them a reason to exercise the same care with respect to servicemen that they are now motivated to exercise toward civilians. In any event, the individual controller who was responsible for LCDR Johnson's death is not named as a defendant in the plaintiff's action, and it is the rare case in which an air traffic controller is ever named as a defendant in a suit like this one, given the solvency of the Government.

"subject matter jurisdiction". Instead, and because the issue would obviously appear to be "fact sensitive" if the Government were successful in generating such a concern here, the case should be allowed to proceed so that the facts can be sufficiently developed. There will be time enough in the future to dismiss the action if any of the Government's concerns should ever prove to have a foundation—and the provision for summary judgment would appear to be appropriate to that task.

That alternative disposition is important to us, because we know what the facts will be in this case, and we know that they will not implicate any of the Government's hypothetical concerns. The Government also knows that, because the facts of which we are aware are contained in documents which the Government itself prepared during its own internal investigation of the accident in suit.[9] In

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9. Those documents reveal that LCDR Johnson departed the Naval Air Station at Barbers Point on Oahu in good weather under visual flight rules—not under the positive control of the FAA. He proceeded eastbound toward the rescue site (off the island of Maui), where he intended to rendezvous with a Coast Guard C-130 which was orbiting the site in visual meteorological conditions, or land at Maui if weather conditions were unfavorable for a rescue. After more than 20 minutes in visual meteorological conditions, he encountered deteriorating conditions as he was approaching the island of Molokai. At that point, he requested routine IFR (instrument flight rules) handling from the FAA's Air Route Traffic Control Center. The controller on duty cleared him to proceed IFR, and vectored him to a point three miles off the northwest corner of Molokai, stating that he intended to vector him eastbound thereafter along the north shore of the island. An altitude of 2,000 feet was assigned. The controller was also working two civilian air cargo planes on IFR flight plans in the same general area.

Fourteen minutes after LCDR Johnson had requested his IFR clearance, and when his helicopter had cleared the northwest corner of Molokai, the controller assigned him an eastbound heading which was supposed to keep him clear of the north shore of the island. Unfortunately, because of northerly winds in the area, the assigned heading did not produce an eastbound track

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effect, the government has asked this Court to bar this action for reasons it cannot prove, simply because it has never been called upon to prove them—and that is not the way our jurisprudential system is supposed to work. We have been advised by amicus curiae that the legal basis for our suggested alternative disposition will be the primary subject of his brief, so we will not duplicate his efforts here. We will turn instead to the miscellaneous contentions with which the Government has concluded its brief.

C. Neither the Veterans' Benefits Act nor the distinctively federal relationship between a serviceman and the Government, by themselves, provide a reason for barring the plaintiff's action.

1. The Government next asserts that the Veterans' Benefits Act is the plaintiff's "exclusive remedy" and that her FTCA action should be barred as a result. We had thought that this contention was put to rest by this Court long ago when it *squarely* held that the Veterans' Benefits Act did not provide an "exclusive remedy" prevent-

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Footnote continued—

across the ocean. LCDR Johnson flew into a mountain on the northeast corner of the island at 2,000 feet, approximately 11 minutes after turning to the heading assigned by the controller. Although the ground track of his helicopter was displayed on the controller's radar scope throughout those 11 minutes, the controller never corrected the demonstrably erroneous heading which he had initially assigned.

We realize that those facts are not presently in the record, and we would not ordinarily have represented them to the Court. However, the Government's unfounded insistence that this case will compromise sensitive military affairs and that it should be dismissed at the threshold without any opportunity to prove otherwise, has left us little choice. In any event, the documents from which these facts have been derived are the Government's documents, and the Government is free to correct us if we have misread them in any way. The documents are also available to the Court if it should wish to examine them.

ing resort by a serviceman to the FTCA, and that benefits received under the Act were merely to be offset against a recovery in the FTCA action. *Brooks v. United States*, 337 U.S. 49 (1949); *United States v. Brown*, 348 U.S. 110 (1954). Notwithstanding these square holdings, the Government resurrects and advances a dictum (and it is indisputably a dictum) from *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 (1980), to the effect that VA benefits are the "exclusive" and "sole remedy" available to servicemen. In our judgment, this dictum provides no basis for reading into the Veterans' Benefits Act an "exclusive remedy" provision which Congress left out. At best, the *Hatzlachh* dictum is ambiguous; at worst, it is inaccurate. The problem is that the *Hatzlachh* dictim attributes a holding to *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), which does not appear there.

In *Stencel*, the Court had noted that "the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries". 431 U.S. at 673. This offhand statement could not properly be read to mean that the Veterans' Benefits Act provided an "exclusive remedy", unless the Court meant to overrule both *Brooks* and *Brown*. *Stencel* did not purport to overrule either case, however. In fact, *Brown* was cited and quoted with approval in *Stencel*. Our reading of *Stencel* was subsequently vindicated by this Court, *after* it penned the *Hatzlachh* dictum, in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). There, the Court stated that *Stencel* relied "primarily on the military nature of the action . . . [and] precluded the substantive claim without regard to any exclusive-liability provision" (460 U.S. at 197 n. 8), and it held that an express exclusive liability provision in the FECA did not bar the type of indemnity

action proscribed by *Feres* and *Stencel*, where the plaintiff in the underlying action against Lockheed was a civilian employee of the Navy. Certainly, the *Hatzlachh* dictum does not survive that later observation.

In any event, most of the lower courts which have confronted the *Hatzlachh* dictum (or the passage from *Stencel* upon which it was based) have read the dictum to mean that receipt of VA benefits becomes a serviceman's "sole remedy" only *because* (and when) the *Feres* doctrine otherwise bars an FTCA action, not that an FTCA action is barred *because* of the receipt of VA benefits. *See, e. g., Cole v. United States*, 755 F.2d 873 (11th Cir. 1985); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980). That reading of the *Hatzlachh* dictum would appear to have been fully endorsed by this Court's most recent decision on the point, in which it purposefully observed that the VA benefits rationale of *Feres* was "no longer controlling". *Shearer*, 87 L. Ed.2d 44 n. 4. *Brooks* and *Brown* would therefore appear to be still very much alive.

The Government observes that this Court has read "exclusive remedy" provisions into other federal compensation schemes, notwithstanding their omission by Congress. These decisions were bottomed upon this Court's understanding of the "legislative intent" of those schemes, however, and this Court has already determined that the "legislative intent" of Congress in enacting the Veterans' Benefits Act was that it was *not* intended to be a serviceman's "exclusive remedy". *Brooks, supra; Brown, supra.* If the question were open here, we would also observe that 38 U.S.C. §351 expressly recognizes that the FTCA and the Veterans' Benefits Act may provide duplicate recoveries in some circumstances, and that duplication is to

be prevented by appropriate setoffs, as this Court held in *Brooks* and *Brown*.[10] Certainly, if the question of "legislative intent" were still open here, this provision would prove the contrary of the Government's contention here; it would prove that the Veterans' Benefits Act was *not* intended to be an "exclusive remedy", precluding resort to the FTCA. It is also worth noting that reading an "exclusive remedy" provision into the Veterans' Benefits Act would deprive *all* veterans, not merely active-duty servicemen, of their remedies under the FTCA. Unless this Court is anxious to recede from its "no longer controlling" announcement in *Shearer* before its ink has scarcely dried, the plaintiff's entitlement to Veterans' Benefits, by itself, provides no reason for barring her FTCA action.

2. The Government next contends, borrowing from another of *Feres*' now-discredited rationales, that it would be anomalous for the Government's liability in cases like this one to depend upon the different laws of 50 states. This contention, like the preceding one, is also made in the face of this Court's observation in *Shearer* that this rationale of *Feres* is now "no longer controlling". That rationale has not been a viable rationale for *Feres* since this Court discarded it in *United States v. Muniz*, 374 U.S. 150 (1963).

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10. . . . Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

There is a more important point to be made here, however. This Court's announcement in *Feres* that it would be anomalous to have the "distinctively federal relationship" of the Government and its servicemen governed by the different laws of the several states was made in the context of an *intramilitary* dispute. It *is* arguably anomalous to have sensitive military affairs impacting upon military discipline governed by separate state laws. However, it is clearly the unique relationship between servicemen and their superiors in the chain of command which implicates this concern, not the mere fact that servicemen are federal employees—which is probably why this Court carefully phrased its observation in *Shearer* that, "[a]lthough no longer controlling, . . . [i]t would be anomalous for the Government's *duty to supervise servicemen* to depend on the local law of the various states". *Shearer*, 87 L. Ed.2d at 44 n. 4 (emphasis supplied). We need not quarrel with that observation here.

We need not quarrel with the observation because the "duty to supervise servicemen" is simply not in issue here. What is at issue here is the negligence of a civilian air traffic controller employed by the FAA. The FTCA provides that the propriety of the conduct of FAA controllers is to be governed by the various laws of the several states, and if LCDR Johnson had been a civilian, the propriety of the heading and altitude assigned to him by the negligent controller who precipitated this case would clearly be determined by the law of Hawaii. If that is anomalous, the anomaly was purposefully created by Congress, and the anomaly itself can therefore provide no reason for barring the plaintiff's resort to the very Act which purposefully created it. In short, whatever viability the "distinctively federal relationship" rationale may

still retain, it can only be a reason for prohibiting FTCA actions which involve the judiciary in sensitive military affairs at the expense of military discipline. It cannot be a valid reason for prohibiting a suit against the Government for the negligence of an air traffic controller, because the judiciary routinely involves itself in those kinds of suits every day. *See Cooper v. Perkiomen Airways, Ltd.*, 609 F. Supp. 969 (E.D. Pa. 1985) (*Feres* does not bar suit against FAA by serviceman, as passenger in commercial airplane; not anomalous to apply law of place of accident).

3. Finally, the Government contends that an affirmance of the lower court's decision will allow plaintiffs to "evade" the *Feres* doctrine by "artful pleading", "simply by alleging only civilian negligence" (petitioner's brief, pp. 26-27). Frankly, we are puzzled by this contention. The issue presented here is not how to plead a case against the Government; the issue is whether the Government can be held *liable* for the negligence of a civilian employee who has wrongfully killed a serviceman. "Civilian negligence" was alleged in this case, not to "evade" the *Feres* doctrine, but because the tortfeasor was a civilian. If the tortfeasor had been a superior officer of LCDR Johnson, no amount of "artful pleading" in the world could have allowed us to "evade" the *Feres* doctrine merely by alleging that he was a civilian—because we could never have proven it, and the *Feres* doctrine would ultimately have barred our action on the facts. It is clearly the facts which control this issue; the pleadings will take care of themselves.

D. A concluding observation.

We recognize that there is tension in the decisional law on the point at issue here—tension which requires resolution of conflicting views. Resolution of the tension

requires reasoned analysis, however—and if there is to be a reasoned analysis of the tension, it must begin with the reasons that the *Feres* doctrine was adopted in the first place. The *Feres* doctrine does have a legitimate purpose and a primary reason—the preservation of military discipline. It is neither a license for tortious conduct nor a mandate of second-class citizenship for servicemen. When applied, however, it undeniably has both effects.

The *Feres* doctrine should therefore be applied sparingly, only when necessary—only when its legitimate purpose and primary reason are served:

> Chief Justice Warren had occasion to note that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes:" Warren, The Bill of Rights and the Military, 37 NYUL Rev. 181, 188 (1962). This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. [Citations omitted]. But the special relationships that define military life have "supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that the courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." Warren, supra, at 187.

Chappell v. Wallace, 462 U.S. 296, 304-05 (1983).

The instant case does not intrude upon military affairs, nor will it have any impact upon the military disciplinary structure. *Feres* is, in short, a rule without a reason on the facts in this case—and to apply it in this case, merely because LCDR Johnson had doffed his civilian clothes,

would do no more than license tortious conduct and mandate second-class citizenship for no legitimate reason. We therefore urge the Court to decline the Government's request that the limited exception to the FTCA created by *Feres* be expanded to embrace the quite different circumstances presented in this case.

CONCLUSION

It is respectfully submitted that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF HORTON JOHNSON, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. a. Respondent posits a great fork in the road of judicial application of the *Feres* doctrine, and argues that the better and more recent authority demands a determination in every case whether "pursuit of the litigation would involve the judiciary in sensitive military affairs at the expense of military discipline" (Br. 14). In so asserting, respondent misconstrues nearly all of the authority on which she relies. In fact, it continues to be quite clear that the *Feres* doctrine bars liability "under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" (*Feres* v. *United States,* 340 U.S. 135, 146 (1950)), and that no probing factual analysis is required where, as here, that test is plainly met.

Determination of the availability of FTCA relief based on whether an injury occurred incident to service was recognized in *Brooks* v. *United States,* 337 U.S. 49 (1949),

even before *Feres* was decided.[1] and has been the governing rule since. There is no substantial body of authority suggesting that this approach has outlived its usefulness.[2] Even in most of the appellate court decisions cited by respondent (Br. 17-18) as exemplars of a supposed case-by-case approach to *Feres,* the court framed the issue as whether the injury occured incident to service.[3] So, too, in

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[1] The question in *Brooks,* as the Court stated it at the outset, was "whether members of the United States armed forces can recover under [the Federal Tort Claims Act] for injuries not incident to their service" (337 U.S. at 50).

[2] In finding *Feres* inapplicable to a lawsuit for injuries resulting from negligent medical care of a military veteran, the Court in *United States* v. *Brown,* 348 U.S. 110, 113 (1954), reaffirmed "the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty," and concluded that "[s]ince the negligent act giving rise to the injury in the present case was not incident to the military service, the *Brooks* case governs * * *."

In *United States* v. *Muniz,* 374 U.S. 150, 159 (1963), while declining to extend *Feres* to bar an action by a federal prisoner for injuries resulting from the negligence of a government employee, the Court reiterated its holding that "a soldier could not sue under the Federal Tort Claims Act for injuries which 'arise out of or are in the course of activity incident to service.' " The Court there found "no occasion to question *Feres,* so far as military claims are concerned" (*ibid.*).

[3] See *Cole* v. *United States,* 755 F.2d 873, 875, 877 (11th Cir. 1985); *Roush* v. *United States,* 752 F.2d 1460, 1463 (9th Cir. 1985); *Brown* v. *United States,* 739 F.2d 362, 363 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985); *Johnson* v. *United States,* 704 F.2d 1431, 1436 (9th Cir. 1983); *Parker* v. *United States,* 611 F.2d 1007, 1010, 1011, 1015 (5th Cir. 1980); *Cooper* v. *Perkiomen Airways, Ltd.,* 609 F.Supp. 969, 971 (E.D. Pa. 1985).

A number of appellate courts have addressed the applicability of *Feres* to actions concerning injuries to servicemen brought pursuant to the Swine Flu Act, 42 U.S.C. (1976 ed.) 247b(j)(1), which substituted liability of the United States under the FTCA for the otherwise applicable liability of private concerns involved in the swine flu inoculation program. *Brown* v. *United States,* 715 F.2d 463 (9th Cir. 1983); *Hunt* v. *United States,* 636 F.2d 580 (D.C. Cir. 1980). These cases

United States v. *Shearer*, 473 U.S. 52, 57 (1985), the Court reiterated with apparent approval *Feres*' enunciation of the incident to service test.

Of course, at the margin—where it is not obvious that a given event occurred incident to service—courts have indeed resorted to a complex analysis of a number of factors, including the way in which military discipline and decisionmaking are likely to be affected if litigation is allowed. Thus, in *Shearer*, the Court gave great attention to the effects on military "management" of a lawsuit alleging Army negligence in connection with the off-duty, off-base murder of one soldier by another (473 U.S. at 57-59). And in many of the cases cited by respondent from the courts of appeals—typically involving conduct occurring off-duty and sometime off-base—similarly complex analyses have been determinative. See cases cited note 3, *supra*.

However, such an approach to activities tied less explicitly to the injured party's military service has no implications for cases, like the present one, of injuries plainly

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have found *Feres* inapplicable based on the unique nature of the Swine Flu Act and the fact that private rather than government action was being called into question.

We are aware of only three cases, including the present one, where courts have suggested that *Feres* may be inapplicable to actions alleging government wrongdoing, even where an injury occurs incident to service. In *Stanley* v. *United States*, 786 F.2d 1490, 1498 (11th Cir. 1986), the court required a second level of inquiry into the effects on military discipline as a prerequisite to application of *Feres*, even where the injury occurs incident to service. This Court has granted certiorari (No. 86-393 (Dec. 8, 1986)). In *Atkinson* v. *United States*, 804 F.2d 561, 563 (9th Cir. 1986), the court found *Feres* inapplicable to a medical malpractice claim by a servicewoman, reasoning that the doctrine applies only where litigation would require a court to second-guess military decisions or where plaintiff's admitted activities directly implicate the need to safeguard military discipline. The United States presently has pending a petition for rehearing en banc in the court of appeals.

suffered in the course of a military mission.[4] Such cases should be governed, without further analysis, by this Court's unexceptioned incident to service rule. That categorical rule is proper, because it pertains to the "*type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer,* 473 U.S. at 59).[5]

b. This is so, moreover, as we showed in our opening brief, whether or not the plaintiff has sued the United States alleging negligence on the part of civilian employees only. Such cases will often involve possible negligence by civilian or military employees of the United States in the formulation and implementation of a particular military exercise or action. As the role that the FAA performs in assisting the military illustrates (see our opening brief at

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[4] Amicus Gilardy states (Br. 8, 22) that the military rescue mission had been terminated at the time Lieutenant Commander Johnson's heliocopter crashed, so that "the FAA air traffic controllers were not called upon to assist in a dangerous military operation" (Br. 10). That is absurd. It is undisputed that Lieutenant Commander Johnson and his crew responded to a distress call from a boat lost in a storm and that, during the rescue mission, because of deteriorating weather conditions, they requested assistance from Federal Aviation Administration (FAA) air traffic controllers (see Resp. Br. 3).

Amicus Gilardy argues that the accident did not occur as part of a military operation, because at the time of the accident Lieutenant Commander Johnson planned to land, refuel, and wait for daybreak (Br. 8). Whether Lieutenant Commander Johnson was planning to refuel or whether he was planning to search for the boat without refueling, the accident occurred during the course of the rescue operation.

[5] Respondent and amicus Gilardy contend that because this case was dismissed by the district court (Pet. App. 35a) on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) the allegations in the complaint are taken to be true. This is of course correct. It does not follow, however, that the application of *Feres* depends on a probing evaluation of the facts as alleged by the plaintiff.

14-17), the conduct of a military mission may sometimes be questioned just as effectively by challenging civilian actions as by challenging the actions of service members.[6] In addition, even where the alleged civilian tortfeasor does not regularly work with the military, defense of the case may not be possible without focusing on questions of military fault in the formulation or execution of a military action. Since it may be that military personnel rather than civilians were primarily responsible for the harm, the United States might need to prove unactionable military negligence in order to defend the case. So too, it might be necessary to prove contributory negligence on the part of the injured service member.

Respondent nevertheless contends (Br. 26) that cases such as this one should go forward subject to dismissal at some undisclosed time if military decisions are in fact called into issue. Much of the harm to military discipline and effectiveness, however, is likely to be sustained as a result of the inquiry into the facts of the case, so that much

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[6] *Newell* v. *Maritime Administration*, petition for cert. pending, No. 86-1002, underscores this point. In *Newell*, a service member was injured while participating in a Navy reserve training exercise. The ship on which the training exercise was conducted is part of the Nation's Ready Reserve Force, a fleet of ships acquired and maintained through the joint efforts of the Navy and the Maritime Administration, a civilian agency of the federal government. The service member sued for damages, carefully avoiding any direct claim of Navy negligence, but instead alleging that the Maritime Administration was negligent in maintaining the ship. The district court dismissed on the basis of *Feres* and the Third Circuit affirmed, holding that "the rule in *Feres* cannot be artificially limited to cover only military personnel, but * * * must also include those civilians who are necessarily involved in activities incident to military service." 86-1002 Pet. App. 20a-21a. But if respondent's views were accepted, it is clear that a multitude of military decisions—like those made daily by FAA controllers or personnel in the Maritime Administration—would be subject to judicial scrutiny.

of the harm the *Feres* doctrine aims to prevent would occur as a result of the case-by-case inquiry itself. For example, it is common in cases such as this that there will be a real question whether pilot error or errors on the part of other Coast Guard members were the cause of the crash. The process of attacking the deceased pilot's actions or the actions of other Coast Guard members in court would have a deleterious effect on military discipline and effectiveness.[7]

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[7] Respondent states that whether or not suits based on injuries incurred incident to service will generally call military decisions into question, a Coast Guard report that is not part of the record shows that there is no doubt that air traffic controller negligence, rather than Coast Guard errors, caused the crash at issue (Br. 26-27 & n.9). We submit that such an assertion is completely irrelevant, both because it rests on facts outside the record, and because the specific facts of an injury clearly incurred incident to service do not affect the applicability of *Feres*.

Lest the Court misunderstand our silence, however, we must also take issue with respondent's characterization of the report. Far from placing the blame for the accident squarely on the air traffic controller, the report suggested that a number of factors led to the crash, including the crew's inattention and its failure to obtain a weather report before taking off. It stated that the fatigue of the crew members (who had been on duty for 22 hours, during which they had slept for about 2-1/2 hours) was probably a factor causing them not to keep properly alert and questioned whether, in light of the hazardous weather conditions and the fatigue of the crew, a different crew should have been sent on the mission. It also stated that fatigue on the part of the air traffic controller could have been a factor in causing the crash.

The report also suggested that the Coast Guard equip helicopters like the one used in the mission with radar, since that would have prevented the crash at issue, and concluded that the radar used by the air traffic controller did not permit the controller to determine accurately how far the helicopter was from the island where it crashed. In short, contrary to respondent's statements, the report suggested a number of ways in which Coast Guard personnel, including the crew, may have been responsible for the crash.

More broadly, the allowance of suit for actions occurring incident to duty would be at odds with the special type of service rendered by the nation's military—marked by emphasis on duty to country, obedience to superior authority, and acceptance of injury or even death. This special type of service is a badge of honor and distinction for which our military pesonnel are rightly celebrated in life and death, and recognized with special kinds of benefits. It requires a commitment to perform the appointed mission notwithstanding risks far beyond those typical of everyday life—risks that in some circumstances may be overwhelming. See *McKay* v. *Rockwell International Corp.*, 704 F.2d 444, 453 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984). Such traits of character and mind as the military demands do not cohabit easily with a tort system that dwells on a service member's rights against those who cause him harm. A set of rules which starts with the premise that the availability of judicial relief is the rule rather than the exception tends itself to undercut military discipline and effectiveness by deemphasizing and minimizing the extraordinary commitment that is required. Thus, the *Feres* bar to suit for injuries incurred incident to military service is a recognition not only of the possible harmful effects of specific litigation, but also that the military mission in general demands a unique form of dedication and selflessness from those who carry it out.

2. We also contended in our opening brief (at 22-27) that veterans' benefits are the exclusive remedy for service members injured incident to military service, as this Court has repeatedly stated. *Hatzlatchh Supply Co.* v. *United States,* 444 U.S. 460, 464 (1980); *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666, 673 (1977). Respondent contends (Br. 27-30) that we have failed to recognize that this Court authorized receipt of both veterans' benefits and tort recoveries in *Brooks* v. *United States,* 337 U.S. 49 (1949), and *United States* v. *Brown,* 348 U.S. 110

(1954). In fact, we explicitly recognized (Br. 23 n.11) that the receipt of veterans' benefits does not itself bar a tort action against the government. However, since *Feres,* it is clear that veterans' benefits are the exclusive remedy *for injuries incurred incident to military service.*[8]

Respondent also notes (Br. 10), as we did (Br. 8 & n.2), that Congress has considered amending the Federal Tort Claims Act (FTCA) on a number of occasions to authorize service members to pursue FTCA claims in some cases where injuries were incurred incident to military service. It has been clear since this Court's decisions in *Brooks* and *Feres,* which were issued shortly after the enactment of the FTCA, that veterans' benefits are the exclusive remedy for injuries incurred incident to service, and Congress is clearly aware of that rule. The Court noted in *Feres* that if it had misunderstood Congress's intention, "Congress possesses a ready remedy" (340 U.S. at 138). If subsequent congressional intention is ever to be relevant to the ascertainment of the meaning of a previously enacted statute, the extended period of congressional inaction here[9] suggests that any

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[8] We also noted in our opening brief that, as the Court stated in *Feres* (340 U.S. at 143), it "would hardly be a rational plan" to have a service member's right to pursue a tort action depend on the laws of the fifty states. Respondent focuses on the air traffic controller whose negligence allegedly caused the crash, and contends (Br. 31) that it is not anomalous to have his actions governed by the laws of Hawaii. However, this Court in *Feres* focused on the injured service member, not on the alleged tortfeasor, in concluding that Congress did not intend to permit service members injured incident to military service to pursue tort actions against the United States in which their rights would vary depending on the state in which the injury occurred.

[9] The recent proposed amendments to the FTCA that were not enacted involved proposed waivers of sovereign immunity so that service members could bring medical malpractice suits. See H.R. 1161, 99th Cong., 1st Sess. (1985); H.R. 1942, 98th Cong., 1st Sess. (1983).

departure from the settled rule that veterans' benefits are the exclusive remedy for injuries incurred incident to service ought to come from Congress. See *Flood* v. *Kuhn*, 407 U.S. 258, 283-284 (1972).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40215

Supreme Court, U.S.
FILED
DEC 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

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BRIEF FOR AMICI CURIAE WILLIAM H. GILARDY, JR., As Special Administrator of the Estate of David Lee Thompson; FRANK W. THOMPSON; DORY THOMPSON and KIM M. THOMPSON IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the doctrine of Feres v. United States, 340 U.S. 135 (1950), bars an action under the Federal Tort Claims Act brought on behalf of a serviceman killed incident to military service where the complaint alleges the negligence of civilian employees of the federal government.

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INTEREST OF THE AMICI CURIAE

Amici curiae files this brief with the consent of Charles Fried, Solicitor General, United States of America, for Petitioner, and Joel D. Eaton, Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow

and Olin, P.A., for Respondent. The letters of consent from all parties are on file with the Clerk of the United States Supreme Court.

The interest of the amici curiae in this case arises from the fact that they are parties to pending litigation arising out of the same crash. Their case under the Federal Tort Claims Act for the wrongful death of David Lee Thompson is pending in the United States Court of Appeals for the Ninth Circuit. Thompson was a crew member killed in the same helicopter and his case (Gilardy, et al. v. United States, Civ. No. 84-2269) has been stayed pending the decision to be rendered in this case.

The issues raised by the Petitioner of concern to amici curiae are, first, the Petitioner's attempt to misrepresent and argue the facts surrounding the flight in

question and, second, the need for this Court to establish clear procedural and substantive standards for judicial determination of whether a serviceman's claim is barred by the Feres Doctrine.

STATUTES INVOLVED

Fed. Rule Civ. Pro. 12(b)(1):

> **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter,....

Fed. Rule Civ. Pro. 12(d):

> **Preliminary Hearing.** The defense specifically enumerated (1) - (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

SUMMARY OF ARGUMENT

The just resolution of this case (and every case in which the government asserts the Feres Doctrine as a defense) requires a full exposition of the facts surrounding the tort so that a determination can be made as to whether the litigation will have a substantial adverse impact on military discipline. This case is presented to the Court on the pleadings. The District Court granted a motion to dismiss under Rule 12(b)(1) based on the allegations of the complaint and undisputed facts. Therefore, the allegations of the complaint are deemed to be true. Smith v. Gross, 604 F.2d 639, Fn. 1 (9th Cir. 1979) and Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 603 (9th Cir. 1976).

However, the Petitioner's Brief adds, edits, and argues facts not within the

pleadings which differ drastically from those facts alleged and undisputed in Johnson and Gilardy. Amici believe that the facts of the same accident as developed and plead in Gilardy are more developed and accurate and will provide a sounder basis for this court to make its determination.

Since this Court's decision in Feres v. United States, 340 U.S. 135 (1950), courts have applied and interpreted the Feres Doctrine without a factual development of the record. This has resulted in simplistic and strict applications of the Feres Doctrine with the result of incredulous and meaningless distinctions between those lawsuits which have been allowed and those barred by the Feres Doctrine. This case comes to the Court in that same "classic" procedural posture - a Rule 12 motion to dismiss for lack of

subject matter jurisdiction followed by an appeal to the Courts of Appeal. It provides this Court with the unique vehicle to articulate procedural standards for the resolution of the Feres defense and to establish a standard for resolving this complex factual issue ("Will the litigation, based on the facts of each case, have a substantial adverse impact on military discipline?) in the context of a Rule 12 motion asserting that the court has no subject matter jurisdiction.

ARGUMENT

1. PETITIONER'S STATEMENT OF FACTS AND USE OF THOSE FACTS IN ITS BRIEF IS NOT SUPPORTED BY THE PLEADINGS IN EITHER THE JOHNSON CASE OR THE GILARDY CASE.

In both cases the District Courts, in an unreported opinions, granted motions to dismiss under Rule 12(b)(1) based on the allegations in the complaints and

undisputed facts. Therefore, the allegations of the complaints are deemed to be true. Smith v. Gross, 604 F.2d 639, fn.1 (9th Cir. 1979) and Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 603 (9th Cir. 1976). However, the Petitioner by adding, deleting and editing the facts as they have seen fit has placed before this Court an accident and underlying set of facts that raise issues of fact that were never considered or decided by the District Courts or the Courts of Appeals.

Petitioner describes events leading up to the accident as, "[W]hile searching for the boat Lt. Commander Johnson requested radar assistance from the Federal Aviation Administration (FAA) air traffic controllers." (Petitioner's Opening Brief at 2.) However, as pled and argued before the District Courts,

this accident occurred after the rescue mission had been cancelled. Lt. Commander Johnson then elected to proceed to Maui to refuel at a civilian airport and wait for daybreak.

The "military mission" the government tries to attribute to this flight was terminated and the helicopter was proceeding to Maui as any other civilian aircraft would. Enroute to Maui, Lt. Commander Johnson requested FAA radar assistance to the civilian airport there. The FAA controller was required to give Lt. Commander Johnson an altitude and a heading that would have safely guided the helicopter around the mountains of the island of Molokai. However, the heading was negligently given and placed the Coast Guard helicopter on a collision path with Molokai's mountains. The helicopter's instruments were frozen in

place from the crash and the recorded radar data transmissions show that Lt. Commander Johnson was flying on the precise heading and altitude assigned by the FAA.

This accident is indistinguishable from a civilian accident in which the FAA would have clear liability. See Ingham v. Easter Air Lines, Inc., 373 F.2d 227, 238 (2nd Cir. 1967); United States v. Furumizo, 381 F.2d 965, 967-969 (9th Cir. 1967); Wasilko v. United States, 300 F.Supp. 573 (N.D. Ohio 1967), aff'd. 412 F.2d 859 (6th Cir. 1969); and Dreyer v. United States, 349 F.Supp. 296 (N.D. Ohio 1972). See also United States v. Murray, 463 F.2d 208 (10th Cir. 1972), holding a pilot has a reasonable right to expect air traffic control services offered by the FAA to be timely and safe and that he will be safe if he relies upon such

services. Lt. Commander Johnson and his crew relied entirely upon the FAA to guide them safely to Maui, the same as any civilian pilot.

Despite the Petitioner's contentions to the contrary, the FAA air traffic controllers were not called upon to assist in a dangerous military operation (Petitioner's Opening Brief at 15). It is a distortion and misrepresentation of the true issue involved in this case to imply that this flight was part of "a wide range of important military operations" (Petitioner's Opening Brief at 15). Very simply, as plead and argued at the District and Appellate Courts below, the rescue operation had been cancelled. The Coast Guard helicopter was proceeding in a normal, nonemergency, nonmilitary basis to a civilian airport to refuel, the same

as would a civilian aircraft in a similar situation.

As this court has clearly enunciated in United States v. Shearer, No. 84-194 (June 27, 1985), slip op. 5-7, the critical test to determine whether or not the Feres doctrine will apply in an accident involving military personnel is whether the claim of the serviceman will call into question the decisions and discipline of the military. The Petitioner has had to misrepresent the facts of this case in an attempt to construe this accident as one covered by the Feres doctrine. It plainly is not. It is an accident whose occurrence is identical, in every respect, to that of a civilian operation in which the FAA would be liable.

The focus of this Court's attention should not rest solely on whether the

accident's occurrence was "incident to military service" (Petitioner's Opening Brief at 9). As this court said in Shearer:

> But the site of the murder is not nearly as important as whether the suit requires the civilian court to second guess military decisions, See Stencel Aero Engineering Corp., 431 U.S. 666, 673, 52 L.Ed.2d 665, 97 S.Ct. 2054 (1977) and whether that suit might impair essential military discipline, See Chappell v. Wallace, 462 U.S. 296, 300, 304, 76 L.Ed.2d 106, 103 S.Ct. 2362 (1983). Id., slip op. 6.

There is no proof or evidence, submitted on the pleadings or argued below, that this type of suit would mean that "commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions . . . ." Shearer, slip op. 7. The allegations of the complaint limit the negligent acts solely to the FAA air traffic control services.

Negligence of any other party, or of any other type, is not at issue in this lawsuit. The Petitioner has made no showing other than broad, unsupported assertions that this lawsuit would implicate military discipline.

In the District Courts below, the Petitioner did not argue that military discipline would be affected or that military discipline would be implicated. Now, Petitioner, through its creative use of facts, is hoping to sway this court into an opinion that will bar the decedent's lawsuit against the FAA, a civilian agency of the United States. Petitioner characterizes this suit as requiring military officers to testify about command decisions, as having a substantial effect on military discipline and as opening the flood gates to litigation (Petitioner's Opening Brief at 6).

Nothing could be further from the truth. What this Court will do by upholding the decision of the Eleventh Circuit Court of Appeals will be to allow military personnel the same rights to a full trial under the Federal Tort Claim Act as afforded all citizens of the United States because maintenance of the suit will not affect military discipline.

The pleadings in these cases do not allege or implicate the military or military discipline. Therefore, we ask that this Court uphold the decision of the Eleventh Circuit Court of Appeals in Johnson v. United States.

2. IN CASES WHERE THE EFFECT ON MILITARY DISCIPLINE IS QUESTIONABLE, SUBJECT MATTER JURISDICTION SHOULD NOT BE DETERMINED UNTIL AFTER DISCOVERY AND/OR TRIAL

As this court succinctly stated in Shearer:

> The Feres doctrine cannot be reduced to a few bright line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases. Id., slip op. 5.

The Petitioner in its brief is requesting this Court to ignore the language carefully chosen and written just one year ago in Shearer and, in essence, create a bright line rule. This is most clearly evidenced by the Petitioners comment in their brief which reads, "It is our view that federal employees are immune from common law tort actions arising in the course of their duties." (Petitioner's Opening Brief at 17, fn. 8.) If that were the case then the

Federal Tort Claims Act might as well be repealed. For 32 years this Court has not deviated from the rule that the primary emphasis and focus in applying the Feres doctrine is the potential for involving "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." Shearer, slip op. 7. As this Court has consistently held:

> [I]n the last analysis, Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the tort claims act were allowed for negligent orders given or negligent acts committed in the course of military duty.' United States v. Shearer, No. 84-194 slip op. 5, quoting United States v. Muniz, 374 U.S. 150, 162, 10 L.Ed.2d 805, 83 S.Ct. 1850 (1963), quoting United States v. Brown, 348 U.S. 110, 112, 99 L.Ed. 139, 75 S.Ct. 141 (1954).

The District Courts cannot possibly make such an intricate and important

decision without a review of each suit on a case by case basis. In some cases the determination can be made easily on the face of the pleadings (e.g., a lawsuit against a superior or a military command, or one in which the decisions of military officers are part of the allegations). Other cases clearly will not invoke the Feres doctrine (e.g., when a military officer is injured by a civilian employee of the government while not on active duty and off the military installation). See, Johnson v. United States, 704 F.2d 1431, (9th Cir. 1983); and Brown v. United States, 715 F.2d 463 (9th Cir. 1983). The balance of the cases will require their own factual analysis.

With respect to the many cases which are not so "clear", Rule 12 motion to dismiss are an inadequate means of resolution, as applied by District Courts

in deciding this defense. Rule 12(d) of the Federal Rules of Civil Procedure, 28 U.S.C., provides for the hearing and determination of motions to dismiss pursuant to Rule 12(b) before trial on application of any party, "unless the court orders that the hearing and determination thereof be deferred . . ." Fed. Rule Civ. Proc 12(d). When motions to dismiss may be heard or determined is within the discretion of the court. It would be premature for the court to dismiss for want of subject matter jurisdiction without a full development of the facts and a showing of the potential effect on military discipline.

The courts have applied this rule on a regular basis and without difficulty in other types of cases. (See Simanonok v. Simanonok, 787 F.2d 1517 (11th Cir. 1986); Daigle v. Opelousas Health Care,

Inc., 774 F.2d 1344 (5th Cir. 1985)). In an anti-trust case a motion to dismiss for lack of federal jurisdiction over the subject matter was improperly granted when the exact effect of defendant's conduct on interstate commerce was not known. It was held that determination of subject matter jurisdiction should have awaited a further exploration of the facts so that the defendant's conduct could be more clearly determined. Mar-Farr Corp. v. Copley Press, Inc., 64 F.R.D. 456 (D.C.Ill. 1974). Likewise, the Federal Courts lack jurisdiction in a diversity case if the amount in controversy is $10,000 or below (28 U.S.C. §1332), but often, that determination requires the Court to defer ruling on the motion until more facts and evidence are produced. Etheridge v. Piper Aircraft Corp. 559 F.2d 1027 (5th Cir. 1977).

Application of the Feres doctrine is most closely analogized to the determination of sovereign immunity of foreign nations. In Sea Transport Corp. v. S/T Manhattan, 405 F.Supp. 1244, (D.C.N.Y. 1975), the defendant, a cosignee in an action arising from the collision of a ship carrying a cargo of wheat, was the ministry of food of a foreign nation. The defendant filed an affidavit asserting that it was a government engaged in the purely governmental function of distributing food and other necessities to its people and that it did not engage in trade or commercial activities. However, it failed to state whether the wheat was intended for resale or for free distribution. Additionally, the court had no statement on the issue from the State Department. As a result, the court deferred the decision on the cosignee's

motion to dismiss for lack of subject matter jurisdiction in order to permit the parties to obtain a communication from the State Department and to submit further evidence. Sea Transport, supra, at 1246-47.

The same complex issues arise when the government files a motion to dismiss for lack of subject matter jurisdiction invoking the Feres doctrine. When there are no allegations in the pleadings implicating military decisions, the trial court should reserve ruling on the motion until further evidence is produced.

This precise issue is addressed in Wright and Miller, Federal Practice and Procedure, §1350, Pages 556-559:

> The court, not a jury, must weigh the merits of what is presented on a Rule 12(b)(1) motion, although the court has the discretion to impanel a jury, or refer the question to a master. If, however, a decision of the jurisdictional issue requires a

> ruling on the merits of the case, the decision should await a determination of the merits either by the court on a summary judgment motion or by the fact finder at trial. The court may postpone a decision on the jurisdictional issue for several reasons. It may seek the presentation of affidavits or other evidence on the matters if none have been tendered or if those that have been offered are inclusive. It may also allow discovery to be completed on the issue and further hearing to be held before ruling on the motion or as indicated earlier it may postpone a decision until evidence is submitted at trial if the jurisdictional issue is intertwined with the merits of the case. (Also see cases cited therein.) Id. at 556-559.

Applying those principles to Feres doctrine cases will promote fair and consistent holdings by the lower courts. In the case before this Court, Lt. Commander Johnson's rescue mission had terminated. He was proceeding on a course to Maui just as any civilian aircraft would proceed and had requested enroute radar service from the air traffic center because of the poor weather. There was

no on-going emergency or rescue mission, not special assistance to the military in the performance of their defense functions. The services rendered to Lt. Commander Johnson were indistinguishable from those services rendered to civilian aircraft. Clearly, a fuller development of the facts was required before the District Courts could decide either of the motions below.

In this case, as in many others, Courts should defer or abstain from ruling on the question of subject matter jurisdiction until further investigation and discovery of each case is conducted. At any time in the proceedings when the evidence or the issues begin to involve "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (Shearer, slip op. 7), then the District Courts, by notice of

motion or suggestion to the Court, can rule that the Feres doctrine applies. This is simply a basic rule of fairness, one that upholds the Federal Tort Claims Act, the decisions of this Court, and the interest of military personnel throughout this country. When the judicial inquiry will not or does not affect military discipline, then our servicemen and women should be afforded the same rights as all United States citizens and be allowed to maintain a suit against a civilian agency of the government that negligently performs its duty.

The only practical way both the individual member of the Armed Forces and the Government can have equal and fair protection is for the Courts to defer ruling on a 12(b)(1) motion for lack of subject matter jurisdiction until they have sufficient facts or proof that the

lawsuit will question military decisions or affect military discipline. Until that is shown, there is no just or fair policy to support invoking the Feres doctrine.

CONCLUSION

The Judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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December 1986